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NO. COA01-1301

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v.

DAVID LEE CAMPBELL

Guilford County
Nos. 00 CRS 92570-71;
00 CRS 92573;
00 CRS 92575-76;
00 CRS 93186;
00 CRS 93195;
00 CRS 93197

Appeal by defendant from judgments entered 27 April 2001 by Judge Clarence W. Carter in Guilford County Superior Court. Heard in the Court of Appeals 15 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

Clifford, Clendenin, O'Hale & Jones, LLP, by Walter L. Jones, for defendant-appellant.

WALKER, Judge.

On 7 June 2000, Roderick Deon Johnson, David Stokes, Cedrick Stokes, Dineta Rawls and Tamica Blanding were working at the Sonic Restaurant in Greensboro, North Carolina. After closing the store, the staff was cleaning the restaurant and processing the day's receipts when the lights went out leaving the store dark. A man in a mask appeared and pointed a gun in Johnson's face. He ordered the employees to lie down on the floor and then ordered everyone to

get into the cooler. Soon thereafter, a second man in a mask, taller than the first man, appeared and asked, "Where they at?" The second man then ordered Rawls and Blanding out of the cooler and told them to take off their clothing. The second man had Rawls and Blanding lean against a table and tried to fondle Blanding, but she resisted. The man then went to Rawls and put his finger into her vagina. While the second intruder was with Rawls and Blanding, the first man collected the restaurant's money. After about ten to fifteen minutes, the two men left the restaurant. Rawls later told police that she recognized the voice of the second man as being that of defendant, David Campbell, a former manager of the restaurant. On 14 June 2000, a warrant was issued for defendant's arrest in connection with the robbery and assaults at the restaurant.

At approximately 9:35 p.m. on 19 June 2000, a short distance away from the Sonic, a Subway restaurant was robbed. Tawanna Hilliard testified that she was mopping the floor in the restaurant when she heard the door of the restaurant open. Hilliard turned around to find a man pointing a gun in her face. Hilliard and the intruder went into the back of the restaurant where the store's manager, Kecia Raines, was working. Raines opened the cash register and the intruder took the drawer and emptied the money into a bag. Then, Raines noticed a second intruder in the store, taller than the first, and the second man turned off the store's lights and the store's neon "open" light in the front window. Raines identified the second man at trial as being the defendant.

The second man demanded that Raines open the safe; however, she replied that she did not have the combination. The second man then ordered Raines and Hilliard to go back into the kitchen area and take off their clothing. The second man then made Raines crawl under the sink naked, while the first man took jewelry and \$500 from Raines' purse. The two men also took the clothing of Hilliard and Raines. The second man, the defendant, then ordered Hilliard to stand next to a desk by the back door. Defendant then bent Hilliard over the desk and "ran his fingers up between her legs rubbing her vagina for several seconds." A short time later, the two men exited the store through the back door.

Raines called 911 and gave a description of the two robbers to police. Soon thereafter, an alert was broadcast for the two suspects in the robbery. Two men fitting Raines' description walked in front of Greensboro Police Officers D.C. Webb and R.L. Walton as they were traveling in an unmarked police car. The officers identified themselves and attempted to stop the two men, but the suspects ran. Officer Webb detained the defendant about 100 yards away. The second suspect, who was carrying a duffel bag, ran approximately 600 yards before being subdued by Officer Walton. The duffel bag, however, was not found.

After the arrests, the officers quickly arranged a show-up identification in a parking lot adjacent to the police station. Hilliard and Raines were brought to the parking lot in separate cars. Hilliard and Raines separately identified the two men in the parking lot as the two who had robbed the Subway restaurant, both

noting that the men wore the same clothes as the intruders. Only twenty to twenty-five minutes had elapsed between the time of the robbery and the identification.

Prior to trial, defendant moved to suppress the pre-trial identification, arguing that it was suggestive and resulted in an irreparable misidentification. The motion was denied.

Defendant was convicted of three counts of robbery with a dangerous weapon, two counts of second degree kidnapping, two counts of first degree sexual offense, and attempted first degree sexual offense. Defendant received consecutive terms of imprisonment for each offense and was sentenced to a combined 1172 to 1483 months in prison. Defendant appeals.

Defendant first argues that the trial court erred by denying his motion to suppress the out-of-court identification made by Hilliard and Raines after the Subway robbery. Defendant contends the show-up was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. Defendant notes that the victims were told by police when they made their 911 call that suspects were already in custody. When the victims were shown the defendant, he was in custody and surrounded by police officers.

After careful review of the record, briefs and contentions of the parties, we affirm. Our Supreme Court has stated:

Pretrial show-up identifications . . ., even though suggestive and unnecessary, are not *per se* violative of a defendant's due process rights. The primary evil sought to be avoided is the substantial likelihood of irreparable misidentification. Where the pretrial identification procedures have created a likelihood of irreparable misidentification,

neither the pretrial nor the in-court identification is permissible. An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability.

State v. Turner, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) (citations omitted). The factors to be considered in determining whether a show-up is likely to lead to an irreparable misidentification include:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 365, 289 S.E.2d at 373-74 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977)).

In the instant case, the trial court conducted a hearing on defendant's motion to suppress. The trial court's findings are supported by the following evidence: First, the Subway robbery lasted approximately ten minutes, defendant did not have his face covered, and the victims were in close proximity to the defendant. Second, Raines gave an accurate description of the suspects soon after the robbery. She described them as black, one short, one tall, the shorter suspect wearing a dark t-shirt, and the taller suspect wearing a gray, black and white "short set." Raines also notes that the suspects were carrying a dark duffel bag. Defendant and his co-defendant, who was carrying a duffel bag and matched the

description given by Raines, were spotted near the restaurant a short time later. The show-up occurred less than half an hour after the robbery, and both Raines and Hilliard positively identified the two suspects as the ones who robbed the Subway, specifically noting that they wore the same clothing. Accordingly, the trial court properly concluded the pre-trial identification was not unduly suggestive and the in-court identification of defendant by both witnesses was made independently of the show-up procedure.

Defendant next argues that the indictments for first degree sexual offense were invalid as a matter of law because they failed to specify what factors elevated the offense to the first degree and what specific acts gave rise to the allegations of a sexual offense. See *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000); and *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999). However, we are bound by our Supreme Court's decision in *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 342, cert. denied, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), in which the Court upheld the use of the short-form indictment. See also *Harris v. United States*, ___ U.S. ___, ___, ___ L. Ed. 2d ___, ___ (filed 24 June 2002) (affirming defendant's conviction for brandishing a firearm during the commission of a drug trafficking crime where the indictment only specified that defendant had "knowingly carr[ied] a firearm").

Defendant finally argues that the indictments for kidnapping were invalid as a matter of law since they failed to specify what felony defendant intended to commit. We disagree. The indictments

state that defendant kidnapped the victims "for the purpose of facilitating the commission of a felony." The indictments were not required to specify the felony. *State v. Freeman*, 314 N.C. 432, 435-37, 333 S.E.2d 743, 745-46 (1985). Accordingly, the assignment of error is overruled.

Affirmed in part; no error in part.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).