NO. COA01-1429

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

IN THE MATTER OF:

S. M.,
Respondent

Durham County
01-J-21

Appeal by juvenile-respondent from order entered 24 April 2001 by Judge Ann E. McKown in Durham County District Court. Heard in the Court of Appeals 9 September 2002.

*Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.*

*University of North Carolina Criminal Law Clinic, by Joseph E. Kennedy, for defendant-appellant.*

EAGLES, Chief Judge.

Respondent S. M. appeals from an order adjudicating him delinquent after having been found responsible for committing attempted larceny from a person.

The evidence tended to establish the following. On 19 October 2000, D. J., a sixteen-year-old male student at Hillside High School in Durham, was walking from the school's cafeteria to the library with a friend. Respondent and two other males, B. and L., were standing together "on the wall" near the entrance to the library. As D. J. and his friend approached the library, B. called

out to D. J. and summoned him to where respondent, B. and L. were standing. B. asked D. J. if he had any money. D. J. told B. that he did not. B. asked D. J. again if he had any money. D. J. again replied negatively. Following D. J.'s answer, respondent and B. searched D. J.'s pockets but found no money. Then B. and L. ordered D. J. to remove his boot, turn it upside down and shake it. After D. J. complied, he was allowed to leave.

The next day, D. J. reported the incident to the school resource officer assigned to Hillside High School. S. M. was named as the respondent in a juvenile delinquency petition alleging one count of common law robbery. Respondent was adjudicated delinquent for committing the lesser included offense of attempted larceny from a person. Respondent appeals.

Respondent first argues that the evidence was insufficient to sustain a conviction because the State's witnesses failed to physically identify respondent during the adjudicatory hearing. Respondent contends that without a physical, in-court identification, the State's evidence was insufficient to establish that respondent was the perpetrator.

We begin by noting that respondent failed to properly preserve this issue for review.

> A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived.

> Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C.R. App. P. 10(b)(3).

Here, respondent made a motion to dismiss at the close of the State's evidence on grounds that the complaining witness never physically identified him during the hearing. Following the trial court's denial of this motion, respondent introduced evidence consisting of his own testimony as well as that of another witness. At the close of all the evidence, respondent again argued that there had been no identification of respondent, however, respondent failed to renew his motion to dismiss. Therefore, respondent has waived his right to appellate review on this issue.

However, an appellate court may, upon its own initiative, suspend or vary the requirements of any rule in a case pending before it to prevent manifest injustice to a party. N.C.R. App. P. 2. In our discretion, we elect to review this issue pursuant to Rule 2.

"[T]he law requires the State in a criminal prosecution to present to the [trier of fact] substantial evidence of each element of the crime charged and of the accused's identity as the perpetrator." *State v. Stallings*, 77 N.C. App. 189, 334 S.E.2d 485

(1985), *disc. review denied*, 315 N.C. 596, 341 S.E.2d 36 (1986). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988). In *State v. Watts*, 72 N.C. App. 661, 325 S.E.2d 505 (1985), *disc. review denied*, 313 N.C. 611, 332 S.E.2d 83 (1985), this Court held that testimony by a police officer that he arrested the "defendant" for the crime charged was "sufficient identification of the defendant for the jury to find he was the perpetrator of the alleged offenses." *Id.* 72 N.C. App. at 663, 325 S.E.2d at 506.

Here, the victim, D. J., testified on direct examination that "[S. M.] over there" was one of the boys outside the library who searched his pockets. Furthermore, respondent himself testified that he was in fact present when D. J. was called over and searched. Respondent did not dispute that he was the "S. M." to which the victim referred in his testimony. Instead, respondent acknowledged he was present and disagreed only with the victim's characterization of his actions during the incident. We conclude the evidence before the trial court was sufficient to support the conclusion that respondent was the perpetrator of the alleged offense. Accordingly, this assignment of error is overruled.

Respondent next argues that the trial court improperly denied his motion for a verbatim transcript of the probable cause hearing. Specifically, respondent contends a verbatim transcript of the proceeding was necessary to present an effective defense and the

trial court's denial of his motion constituted prejudicial error because he was indigent. After careful review, we disagree.

In *Britt v. North Carolina*, 404 U.S. 226, 30 L. Ed. 2d 400 (1971), the Supreme Court of the United States held that indigents were to be provided free transcripts of prior proceedings if the trial court determines it is necessary for an effective defense.

> Under *Britt* . . . a free transcript need not always be provided. Instead, availability is determined by the trial court through the implementation of a two step process which examines (1) whether a transcript is necessary for preparing an effective defense and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript. If the trial court finds there is either no need of a transcript for an effective defense or there is an available alternative which is "substantially equivalent" to a transcript, one need not be provided and denial of such a request would not be prejudicial.

*State v. Rankin*, 306 N.C. 712, 716, 295 S.E.2d 416, 419 (1982)(citation omitted).

Here, the trial court denied respondent's motion for a verbatim transcript of the probable cause hearing. However, upon motion, the trial court granted respondent full access to the electronic recording of the probable cause hearing, including the right to produce a duplicate recording. A careful review of the trial transcript reveals that this access enabled respondent to obtain an unofficial transcript, which he later attempted to submit to the court during the adjudicatory hearing:

> MR. MORGAN: Okay. And [sic] would like to submit this.
>
> THE COURT: I don't want, I don't want a transcript of your tape. I will listen to the official tape.

Moreover, respondent used this transcript to vigorously cross-examine the victim concerning his testimony at the probable cause hearing. Following respondent's cross-examination of the victim, the trial court listened to the official recording of the probable cause hearing in its entirety.

We conclude on the facts before us that the trial court's denial of respondent's request for a transcript was not prejudicial error because respondent was afforded an alternative that was the substantial equivalent. Further, respondent availed himself of this alternative and utilized it to the same extent as he would have a verbatim transcript. Accordingly, this assignment of error is overruled and the judgment of the trial court is affirmed.

Affirmed.

Judges MARTIN and HUNTER concur.

Report per Rule 30(e).