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NO. COA01-1489

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

In The Matter Of:

DONTE LAMARK AUSTIN

Wake County  
No. 99 J 500

Appeal by juvenile from order dated 20 March 2001 by Judge Robert B. Rader in District Court, Wake County. Heard in the Court of Appeals 11 September 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.*

*Miller & Shedor, PLLC, by Marty E. Miller, for juvenile-appellant.*

McGEE, Judge.

A juvenile petition was filed on 10 August 2000 charging Donte Lamark Austin (juvenile) with the offense of injury to personal property exceeding two hundred dollars. A juvenile summons and notice of hearing were served on defendant's mother, Michelle Renee Austin, on 28 August 2000, with a hearing date of 13 September 2000. The case was continued to 19 October 2000 and subsequently to 9 November 2000. A hearing was not held on 9 November 2000 and no order of continuance was entered. Another summons and notice of hearing were issued on 29 January 2001, setting a hearing for 22 February 2001, but the juvenile was not served with the summons and

notice. The trial court rescheduled the hearing for 20 March 2001, but a new summons and notice were not issued to the juvenile.

Evidence presented by the State at trial on 20 March 2001 tended to show that James McLean (McLean) saw juvenile and Donte Roberts (Roberts) roller skating across from McLean's house on the evening of 8 August 2000. McLean later saw two young men smashing car windows in the service station parking lot across the road and he telephoned the police. McLean was still watching the young men when the police arrived. He testified he told the police that the two young men wearing roller skates were the offenders. McLean also testified that one of the offenders was wearing roller skates and one was not.

The young men fled when they saw the police and ran behind McLean's apartment building. The police pursued and apprehended them and brought them back to the front of the building. McLean identified juvenile as one of the young men he earlier witnessed breaking car windows in the parking lot. McLean also made an in-court identification of juvenile at trial.

Juvenile testified that he had been sitting on the stoop of McLean's apartment that evening and was not involved in breaking the car windows. He further identified the perpetrators as Roberts and Donte Jones (Jones). Roberts testified about his involvement in the incident, identified Jones as the other perpetrator, and denied juvenile was involved in the offense. Juvenile attempted to compel the testimony of Jones, but the trial court upheld Jones's invocation of his Fifth Amendment rights against incrimination.

Juvenile also attempted to compel the testimony of Jones's mother regarding conversations she had with her son about the incident; however, the trial court sustained the State's objection to the testimony on the grounds of attorney-client privilege.

The trial court adjudicated juvenile delinquent and entered a disposition order. Juvenile appeals.

Juvenile first argues the trial court erred in excluding the testimony of Jones's mother based on attorney-client privilege. However, juvenile made no offer of proof as to what her testimony would have been had she been permitted to testify.

It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify.

. . . [I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record.

*State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (citations omitted); see *State v. Hardy*, 353 N.C. 122, 540 S.E.2d 334 (2000); *State v. Pallas*, 144 N.C. App. 277, 548 S.E.2d 773 (2001); see also N.C. Gen. Stat. § 8C-1, Rule 103 (2001); N.C. Gen. Stat. § 15A-1446(a) (2001). This issue has not been preserved for our review and the significance of the evidence is not obvious from the record. This assignment of error is therefore overruled.

Juvenile next argues that the trial court erred in exercising jurisdiction over the case due to a deficiency in service of

process on the juvenile. N.C.R. App. P. 10(a) states that "[e]xcept as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C.R. App. P. 10(b)(1) further states that "[i]n order to preserve a question 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."

Juvenile failed to assign error to the trial court's decision to exercise jurisdiction over this case. Furthermore, the record lacks any objection to the trial court's exercise of jurisdiction over the case. Accordingly, juvenile did not properly preserve this issue for appeal and it is dismissed.

Juvenile next argues the trial court erred in admitting into evidence the in-court and out-of-court identifications of juvenile. Juvenile contends the out-of-court identification was unconstitutionally suggestive due to the surrounding circumstances of the showup. "This Court has, on numerous occasions, sanctioned the use of showups." *In re Stallings*, 318 N.C. 565, 569, 350 S.E.2d 327, 329 (1986). Showups are an unrestrictive means of determining if a suspect committed the crime in question and ensure an innocent party's minimum involvement with the criminal justice system. *Stallings*, 318 N.C. at 570, 350 S.E.2d at 329. The totality of the circumstances test is used to determine the

reliability of a showup identification. *In re Stallings*, 318 N.C. at 571, 350 S.E.2d at 330.

Some of the factors that may be examined in determining the reliability of a showup identification are (1) the witness' opportunity to observe the accused, (2) the witness' degree of attention, (3) the accuracy of the witness' description, (4) the witness' level of certainty, and (5) the time elapsed between the crime and the confrontation.

*Id.*; see *State v. Wilson*, 313 N.C. 516, 529, 330 S.E.2d 450, 460 (1985).

The evidence in the record demonstrates that McLean had ample opportunity to observe the offenders from across the street, he was attentive in his observations, and he remained certain of his identification throughout the case. His attention was focused on the events taking place in the parking lot and he was able to identify the offenders with some degree of particularity, ranging from their hairstyles to their footwear. McLean was actually observing the young men when the police arrived and he made the identification within a couple of minutes of his observations of the criminal acts. The short length of time between his observations and identification supports the reliability of the identification. Furthermore, the proximity between the observations and identification virtually eliminates the possible suggestiveness of the showup. Considering the totality of the circumstances, the evidence is sufficient to support the validity of the out-of-court identification.

Juvenile also argues that the in-court and out-of-court statements should have been excluded from evidence based on the

inconsistencies between the two. However, any discrepancies between the two identifications would relate to the weight of the evidence, not its admissibility. See *State v. Weimer*, 300 N.C. 642, 649, 268 S.E.2d 216, 220 (1980); *State v. Bass*, 280 N.C. 435, 452-53, 186 S.E.2d 384, 396 (1972).

Juvenile further contends the trial court erred in failing to make findings of fact when evaluating the admissibility of McLean's in-court identification on *voir dire*. Juvenile contends that the in-court identification can only be admitted after clear and convincing evidence is presented by the State in a *voir dire* as to the in-court identification's independent origin. See *State v. Tuggle*, 284 N.C. 515, 520, 201 S.E.2d 884, 887 (1974). We have already determined the trial court did not err in admitting the out-of-court identification; therefore, the in-court identification was not improperly based upon the showup. Furthermore, our Supreme Court has held that

[w]here . . . it is equally clear that the lineup was conducted fairly and without prejudice to him, and perfectly obvious that the in-court identification was not fruit of the lineup but had its independent origin in the witness' observation of the crime itself, [the] failure of the trial court to insert such findings into the record must be deemed harmless error.

*State v. Covington*, 290 N.C. 313, 323, 226 S.E.2d 629, 638 (1976) (quoting *State v. Williams*, 274 N.C. 328, 342, 163 S.E.2d 353, 363 (1968)); see *State v. Stepney*, 280 N.C. 306, 185 S.E.2d 844 (1972). Juvenile's assignment of error is without merit.

Juvenile next argues the trial court erred in finding that the allegations of the petition were proven beyond a reasonable doubt. He argues that discrepancies in the trial testimony are sufficient to raise reasonable doubts regarding the proof of the allegations. Juvenile cites no authority in support of this argument and relies solely upon his own interpretation of the evidence.

Where, as here, there is no jury trial, the court is the trier of the facts. As the trier of the facts, the court [has] the duty to determine the weight and credibility to be given to the evidence presented, and he could believe or disbelieve the testimony of any witness.

*In re Whichard*, 8 N.C. App. 154, 160, 174 S.E.2d 281, 285 (1970). As the trier of fact, the trial court weighed the testimony presented at trial and assessed the credibility of the individual witnesses. After weighing the evidence, the trial court determined the allegations had been proven beyond a reasonable doubt through the evidence presented. This Court must determine "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000) (quoting *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981)). We find there is substantial evidence in the record to support such a finding by the trial court. This assignment of error is without merit.

Juvenile lastly argues the trial court erred in permitting the State to object to a defense witness's testimony based on the witness's exercise of the witness's Fifth Amendment privilege

against self-incrimination. Juvenile argues the State's action was equivalent to witness tampering because the witness was essentially convinced to refrain from testifying and possibly confessing. While juvenile correctly states that a witness may voluntarily give testimony even if it is incriminating, see *State v. Hunt*, 339 N.C. 622, 639, 457 S.E.2d 276, 286 (1995), juvenile cites no legal authority to support his contention that the objection by the State prejudiced juvenile or was a reversible error of the trial court. Juvenile also failed to preserve this issue for appeal by not making an offer of proof as to what the testimony would have been had the witness testified. See *State v. Hardy*, 353 N.C. 122, 540 S.E.2d 334 (2000); *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985); *State v. Pallas*, 144 N.C. App. 277, 548 S.E.2d 773 (2001). This assignment of error is without merit.

Affirmed.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).