NO. COA01-1561

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v. New Hanover County
No. 00CRS531

ROBERT EARL WILLIAMS, JR.

Appeal by defendant from judgment entered 3 July 2001 by Judge Ronald K. Payne in New Hanover County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General James A. Wellons, for the State.

Hosford & Hosford, by Sofie W. Hosford, for defendant-appellant.

BIGGS, Judge.

Robert Earl Williams, Jr. (defendant) was charged with assault with a deadly weapon inflicting serious injury. The State's evidence tended to show the following: on the afternoon of 10 January 2000, Thomas Doughty, Jr. and a friend, Michael Wilkins, were riding around Wilmington, North Carolina, when they decided to visit friends who lived near Taylor Homes, a Wilmington housing project. While stopped at a stop sign near the Taylor Homes area, Doughty observed a man, known to him as "Robbie," standing at the stop sign, apparently waiting to cross the street. When Robbie

failed to cross the street, Doughty gestured impatiently in an attempt to urge Robbie to proceed across the street. Robbie subsequently looked at Doughty and asked, "What the f--- you looking at?" Doughty drove away from the intersection, and continued to his friends' house about four or five blocks away. After exiting the vehicle and shutting the door, Doughty heard someone behind him say, "What you want, to fight me?" Doughty then turned to see Robbie standing about five steps behind him. A white truck was parked at an angle behind the car driven by Doughty. Doughty did not recognize the driver of the truck, a black male with dread locks. Robbie made a statement to the effect that he would shoot Doughty but for the fact that Doughty would run to the police. Doughty replied, "No, it's not like that." Robbie then went back to the truck and returned with a black semiautomatic firearm. Robbie stated, "I don't fight fair," whereupon he shot Doughty in the right leg below the knee. Thereafter, Robbie returned to the truck and left the scene.

Officer Iain Narra, of the Wilmington Police Department, arrived on the scene, and found Doughty lying on the ground holding his leg. Doughty told the officer that a 17-year-old male known as "Little Robbie" shot him. Wilkins told the officer that the shooter's name was Robbie Williams. Doughty was subsequently transported to New Hanover Regional Medical Center, where he remained for five days. After arriving at the hospital, Doughty was interviewed by Detective Kathleen Cochran, also of the Wilmington Police Department, and again identified his assailant as

Robbie. Doughty described Robbie to the detective as a chubby black male with a short build, big lips, big eyes, a light beard, a medium complexion, and a funny walk. In addition, Doughty told the detective that his assailant was wearing a toboggan and an army fatigue/camouflage jacket. Both Doughty and Wilkins subsequently picked defendant out of a photographic lineup, and identified him as Doughty's assailant during in-court testimony.

The jury found defendant guilty as charged, and the trial court sentenced defendant to a presumptive term of 25-39 months. Defendant appeals.

At the outset, we note that in each of his three assignments of error brought forward on appeal, defendant alleges that the trial court committed plain error. The plain error rule was adopted by the North Carolina Supreme Court in *State v. Odom* to ameliorate "the potential harshness of [N.C.R. App. P.] 10(b)(2)," 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). However, the Court warned,

> the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)).

Defendant first argues that the trial court committed plain error in permitting juror number eleven to remain on the jury, after the juror disclosed that he was a firefighter and may have been called to the scene of the instant assault. We disagree.

N.C.G.S. § 15A-1211(b) provides, "[t]he trial judge must decide all challenges to the panel and all questions concerning the competency of jurors." N.C.G.S. § 15A-1211(b) (2001). Additionally, N.C.G.S. 15A-1212(3) and (9) provides that an individual juror may be challenged for cause on the ground that he "[h]as been or is a . . . witness . . . [to] a transaction which relates to the charge against the defendant" or "is unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(3),(9) (2001). This jurisdiction adheres to a doctrine that "even after a prospective juror initially voices sentiments that would normally make him or her vulnerable to a challenge for cause, that prospective juror may nevertheless serve if the prospective juror later confirms that he or she will put aside prior knowledge and impressions, consider the evidence presented with an open mind, and follow the law applicable to the case." *State v. Rogers*, 355 N.C. 420, 430, 562 S.E.2d 859, 867 (2002) (citing *State v. Wallace,* 351 N.C. 481, 521, 528 S.E.2d 326, 351 (2000)). Generally, challenges for cause in jury selection rests in the discretion of the trial court, and are reviewable only upon a showing of an abuse of that discretion. *State v. Sokolowski*, 351 N.C. 137, 522 S.E.2d 65

(1999).

In the present case, after three of the State's six witnesses testified, juror number eleven told the bailiff that he thought he may have been called to the scene of the 10 January 2000 shooting. The trial judge, therefore, examined the juror out of the presence of the other jurors. Juror number eleven told the trial judge that he was a firefighter; and that as a firefighter, he is sometimes called to the scene of medical emergencies as a "first responder[]." The court's examination of the juror revealed only a vague suspicion that he may have been called to the general area of the crime at some time in the past.

> JUROR NUMBER ELEVEN: I remember going to that area. It may not even have been that date, so - -
>
> THE COURT: Okay. Listen to my question. Do you recall going to this particular scene that's been identified in these photographs? Do you have any recollection of that?
>
> JUROR NUMBER ELEVEN: No.
>
> THE COURT: So do I take it, then, that that would not, in any way, affect your ability to be fair and impartial to either side?
>
> JUROR NUMBER ELEVEN: No, it wouldn't.
>
> THE COURT: If you later recall something, if it comes to mind, and I don't want you doing any research but, if it comes to mind that you recall more about it, will you let me know about that?
>
> JUROR NUMBER ELEVEN: I most certainly will.

Juror number eleven never reported recalling anything further. As it appears questionable whether juror number eleven even had any

knowledge of the instant crime scene and where the juror satisfied the trial judge that he could be fair and impartial, we conclude that defendant cannot show any error, much less "plain" error, in the trial court's decision to retain juror number eleven in this case.

Defendant next argues that the trial court committed plain error in admitting certain out-of-court and in-court identification of the defendant as the assailant. Again, we disagree.

Identification evidence must be excluded on due process grounds if a pretrial identification procedure was "so suggestive as to create a very substantial likelihood of irreparable misidentification." *State v. Capps*, 114 N.C. App. 156, 161-62, 441 S.E.2d 621, 624 (1994). In the event that a pretrial identification procedure is determined to be "impermissibly suggestive," the identification evidence may, however, still be properly admitted if the trial court determines that viewing the totality of the circumstances, the pretrial identification is "sufficiently reliable." *State v. Breeze*, 130 N.C. App. 344, 352, 503 S.E.2d 141, 147, *disc. review denied*, 349 N.C. 532, 526 S.E.2d 471 (1998). Factors to be considered in making this determination include the following: "'(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.'" *Capps*, 114 N.C. App. at

162, 441 S.E.2d at 624-25 (quoting *State v. Harris*, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983)).

Defendant failed to object to the admission of the pre-trial or in-court identification evidence at trial. Moreover, on appeal, defendant alleges, and we can find, no irregularities in the photographic line-up presented to the State's witnesses that would give rise to due process concerns. Hence, while defendant alleges plain error in the trial court's admission of pre-trial and in-court identification testimony, we discern no error in this regard, plain or otherwise.

Detective Cochran testified that photographic lineups are generally composed of photographs of people who are similar, but not identical, in age, hair, color, and facial hair. The evidence tends to show that Detective Cochran compiled a photographic lineup after speaking with the victim and Officer Narra, who had also spoken with the victim and his passenger, Michael Wilkins. The detective then took the photographic lineup to the hospital at approximately 9:45 p.m. on 10 January 2000, at which time she read defendant the following statement regarding photographic lineups:

> "In a moment, I'm going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed a crime now being investigated. Keep in mind that hair styles, beards and moustaches may be easily changed. Also, photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo. Pay no attention to any markings or numbers that may appear on the photos, or any other differences in the type or style of the photographs. When you have looked at all the photos, tell me whether or not you see the person who

> committed the crime. Do not tell other witnesses that you have or have not identified anyone."

Thereafter, the victim picked defendant out of the photographic lineup, marked defendant's photograph, and signed and dated the lineup. Detective Cochran also testified that on 18 January 2000, she showed a color copy of the photographic lineup to Wilkins, who was an eyewitness to the 10 January 2000 shooting. Significantly, prior to showing the lineup to Wilkins, the detective moved defendant's photo to a different position in the lineup, just in case the victim had described the position of defendant's photo in the lineup. After being read the same photographic lineup statement as read to the victim, Wilkins picked defendant's photograph out of the lineup, marked defendant's photo, and signed and dated the copy of the lineup.

Defendant argues unpersuasively that the State failed to "establish at trial that the other individuals in the photographic lineup share[d] similar characteristics to those provided in [the victim's] description. Thus, according to defendant, it appears that [Detective] Cochran included [defendant] in the photo lineup solely because his name is similar to that of 'Robbie.'" First, this argument ignores the fact that Wilkins gave Officer Narra defendant's full name when asked the name of the shooter. This information was then given to Detective Cochran and taken into consideration when she compiled the photographic lineup. Moreover, in light of defendant's failure to challenge the admissibility of the identification testimony at trial, the State had no need to

prove that the photographs in the lineup "shared similar characteristics" to those of defendant. Significantly, every photographic line-up in which a defendant appears different from others in the line-up does not violate due process rights. *See State v. Montgomery*, 291 N.C. 91, 100, 229 S.E.2d 572, 579 (1976) ("Due process of law does not require that all participants in a line-up or in a photograph, viewed by the victim of or witness to a crime, be identical in appearance, for that would, obviously, be impossible").

We conclude that defendant has not shown the instant pretrial procedure to have been "impermissibly suggestive." Accordingly, the Court need not further inquire into the reliability of the identification testimony. We again conclude defendant has failed to make the requisite showing of plain, or any other, error.

We move then to defendant's third argument: that the trial court committed plain error in failing to dismiss the charge against him, as there was insufficient evidence that he committed the offense as charged. At the outset, we note that defendant has waived review of this argument on appeal. *See* N.C.R. App. P. 10(b)(3). Defendant did not move to dismiss the charges against him at the close of the State's evidence or at the close of all of the evidence. Instead, he seeks review under the plain error doctrine.

It is well settled that plain error review is not appropriate in instances where a defendant fails to preserve the issue of the sufficiency of the evidence as provided in N.C.R. App. P. 10(b)(3).

See State v. Greene, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000)(stating that "plain error analysis applies only to instructions to the jury and evidentiary matters"). Even if the issue were properly before the Court, in accordance with our conclusion that identification testimony was properly admitted into evidence, there was indeed plenary evidence to submit this matter to the jury. Defendant's argument to the contrary, then, fails.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).