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No. COA01-785

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v.

Caswell County
No. 89 CRS 73, 74

CLAUDE TURNER

Appeal by defendant from judgments entered 10 May 1989 by Judge James M. Long in Caswell County Superior Court. Heard in the Court of Appeals 18 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General David R. Minges, for the State.

Theresa K. Pressley, for defendant-appellant.

TYSON, Judge.

I. Facts

On 8 January 1989, at approximately 4:00 a.m., eighty-nine-year-old Lindzy Byrd ("Byrd") and his wife, Pearl, were awakened by a burglar who was standing in the living room doorway inside their home. The burglar entered their bedroom and took Byrd's wallet and Pearl's pocketbook. The burglar then grabbed both of them by the arm and forced them into the dining room. Byrd testified that while there were no lights on inside the house and he was not wearing his eye glasses, he was able to see the burglar's eyes, back of his head, hair, and mannerisms by outside lights which illuminated the inside of the house. Byrd also testified that the

incident lasted approximately thirty to thirty-five minutes.

Officer Mike Presley ("Officer Presley"), of the Caswell County Sheriff's Department, responded to the burglary call. Officer Presley testified that he found a broken window in the porch, a black tire tool lying on the ground a few feet from the broken window, as well as a broken pane of glass in the interior door from the porch into the house. Byrd described the burglar to Officer Presley as a black male with a short or close haircut, about five-foot eight inches tall, who was wearing a red sweater and blue jeans.

Sergeant Baron Terrill ("Sergeant Terrill"), of the North Carolina Department of Correction, was called to the Byrd residence in the early morning hours on 8 January 1989. Sergeant Terrill, a blood hound and canine handler, brought Linda Sue ("Suzy"), an AKC registered bloodhound, to trail scents. Sergeant Terrill and Suzy had previously worked together on about 250 cases. According to Sergeant Terrill, the weather conditions "were ideal" for tracking on 8 January 1989. It was drizzling and the ground was damp from the rain the night before.

Sergeant Terrill testified that human scent can be tracked for four to eight hours after the event. About three hours after the burglary, Sergeant Terrill scented Suzy on the tire tool found outside the broken window. Sergeant Terrill testified that he was told by Officer Presley that they had secured the area surrounding the Byrd's house. Suzy circled the house and followed the trail toward Highway 62. Sergeant Terrill observed a tire track which

appeared to him that someone had pulled off the edge of the highway. In Sergeant Terrill's opinion, the burglar stopped beside the road, walked along the driveway, circled the house, and then returned to the road via the driveway. The trial court admitted the tracking evidence to show that whoever touched the tire tool may have taken the route described by Sergeant Terrill.

Debra Moore ("Moore"), an acquaintance of Claude Turner ("defendant"), testified that she spent the weekend during which the burglary occurred with defendant. Moore also testified that she and defendant drove past the Byrd's house and returned on 8 January 1989 between 3:00 and 4:00 a.m. At defendant's direction, Moore pulled off Highway 62 near Byrd's driveway. Moore testified that defendant exited the car, removed a tire tool from the trunk, and approached the Byrd's home. Moore also testified that defendant went into the house and remained inside for about forty-five minutes. When defendant returned to the car via the driveway, Moore saw a wallet in defendant's back pocket. Moore further testified that defendant told her that he had robbed the Byrds.

Officer Mark Currin ("Officer Currin") showed Byrd six mugshots, none of which contained defendant's picture on 8 January 1989, the day of the burglary. Byrd was 100 percent sure that none of the mugshots depicted the burglar. On 11 January 1989, Officer Currin showed Byrd another set of mugshots, one of which was defendant. Officer Currin testified that Byrd eliminated four of the pictures, but did not comment as to the other two, one of which was defendant. On 18 January 1989, Officer Currin showed Byrd

another set of mugshots, none of which contained defendant's picture. Again, Byrd stated that none of the mugshots depicted the burglar. Byrd told Officer Currin that he could be more certain if he saw the burglar in person.

During trial, Byrd was asked if he saw the burglar in the courtroom. He pointed to defendant. When asked if he had any doubt about defendant being the burglar, Byrd said, "I know it's him right there ... I'm pretty sure." Byrd further testified that he recognized defendant after observing him in the courtroom by his eyes, the back of his head, his hair cut, mannerisms, and his voice.

Defendant did not testify but called an alibi witness. The jury found defendant guilty of first-degree burglary and felonious larceny. The trial court found as aggravating factors the ages of the victims, the infirmness of one victim, and defendant's prior convictions for criminal offenses punishable by more than sixty (60) days confinement. Defendant was sentenced within the aggravated range for first-degree burglary and felonious larceny. Defendant gave notice of appeal to this Court on 10 May 1989. The proposed record on appeal was filed on 6 November 1989. The record on appeal was never filed with this Court.

Defendant filed a Petition for Writ of *Certiorari* on 12 March 2001 based on his affidavit that he did not authorize the termination of his appeal. We granted defendant a writ of *certiorari* on 21 March 2001.

II. Issues

The issues presented on appeal are whether the trial court erred in: (1) allowing the in-court identification of defendant by the elderly victim who could not identify defendant pretrial or at trial by a photograph, (2) allowing into evidence the bloodhound trailing from the scent of a tire tool, and (3) denying defendant's motion to dismiss at the close of the State's evidence and again at the close of all the evidence.

III. In-Court Identification

Defendant argues that the trial court erred in permitting the in-court identification of him by Byrd as the perpetrator. Defendant contends that Byrd's eyesight, age, inability to pick defendant out of a photographic line-up shortly after the robbery and at trial, coupled with the facts that the robbery was at night, the only lighting came from outside, and the fact that it was raining renders the in-court identification inadmissible and highly prejudicial. We disagree.

"Generally, a witness may make an in-court identification of a defendant and any uncertainty in that identification goes to the weight and not the admissibility of the testimony." *State v. Miller*, 69 N.C. App. 392, 396, 317 S.E.2d 84, 87-88 (1984). "An in-court identification is . . . competent where the in-court identification is based on the witness' observations at the time and scene of the crime." *Id.* at 396, 317 S.E.2d at 88. Pre-trial identifications are not a prerequisite for an in-court identification to be admissible. *State v. Tyson*, 278 N.C. 491, 496, 180 S.E.2d 1, 4 (1971).

While in-court identifications are generally admitted, they may be excluded if "tainted by a prior confrontation in circumstances shown to be 'unnecessarily suggestive and conducive to irreparable mistaken identification.'" *Miller*, 69 N.C. App. at 396, 317 S.E.2d at 88 (quoting *State v. Covington*, 290 N.C. 313, 324, 226 S.E.2d 629, 638 (1976)). "[T]he viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so 'unnecessarily suggestive and conducive to irreparable mistaken misidentification' as would deprive defendant of his due process rights." *Covington*, 290 N.C. at 324, 226 S.E.2d at 638 (quoting *State v. Haskins*, 278 N.C. 52, 178 S.E.2d 610 (1971)).

Here, the trial court found that the in-court identification of defendant was not tainted by any suggestive out-of-court photographic line-up. The trial court concluded that Byrd's in-court identification was based upon his observations at the time of the offense and was not influenced by the suggestiveness of defendant being seated at the defense table. There is substantial evidence in the record to support the trial court's findings and conclusions. On *voir dire*, Byrd testified that he was in the house with the burglar for approximately thirty to thirty-five minutes; that the street lights outside illuminated the inside of the house; that he saw the face, the eyes, the back of the head, and the hair of the person; that he heard the burglar's voice; and that he was

able to identify defendant, based upon seeing him the night of the burglary, after observing the back of his head, his hair, his eyes, and hearing his voice in the courtroom. We hold that the in-court identification by Byrd was properly admitted. This assignment of error is overruled.

IV. Bloodhound Trailing

Defendant argues that the State's bloodhound trailing evidence should have been suppressed because the procedures were unreliable. We disagree.

Bloodhound trailing evidence is proper when the dog (1) is "of pure blood, and of a stock characterized by acuteness of scent and power of discrimination"; (2) possesses "these qualities, and [has] been accustomed and trained to pursue the human track"; (3) has "been found by experience reliable in such pursuit"; and (4) "in the particular case . . . [was] put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification." *State v. McLeod*, 196 N.C. 542, 545, 146 S.E. 409, 411 (1929). Defendant concedes the accuracy of Sergeant Terrill's testimony and the reliability of Suzy in trailing human scents. Thus, we will only address the fourth requirement under *McLeod*.

"To be admissible bloodhound evidence does not have to result in a positive identification." *State v. Irick*, 291 N.C. 480, 497, 231 S.E.2d 833, 844 (1977). "It is sufficient if the dog is laid on the trail 'at a point where the circumstances tend clearly to

show that the guilty party has been" *Id.* at 496, 231 S.E.2d at 844 (quoting *State v. Norman*, 153 N.C. 591, 593, 68 S.E. 917, 918 (1910)). The evidence is properly submitted to the jury when "a reasonable inference as to defendant's guilt arises on the facts" *Id.* at 497, 231 S.E.2d at 844.

Here, the trial court found that there was no direct evidence that the tire tool had remained secured in the position it was found. The trial court concluded that the evidence was admissible to show that the person whose scent may have been on the tire tool made the route trailed by Suzy. During *voir dire*, Sergeant Terrill testified that the weather conditions "were ideal" for tracking. Sergeant Terrill testified that he scented Suzy to the dominant scent on the tire tool. He further testified that the "person [Suzy] trailed around the house from the window and the tire tool is the person that she trailed from down below the drive-way to the north side of [Highway] 62 back to the window of the house." Additionally, Moore testified that she pulled her car off the side of Highway 62 near Byrd's driveway, that defendant got out of the car, removed a tire tool from the trunk, and approached Byrd's home. While the trailing evidence was limited to the person who touched the tire tool, there was sufficient corroborating evidence that defendant, in fact, touched the tire tool to permit a reasonable inference of defendant's guilt. We conclude that the trial court properly admitted the trailing evidence for the limited purpose of showing that Suzy trailed the human scent on the tire tool to a position on Highway 62. This assignment of error is

overruled.

V. Motion to Dismiss

Defendant argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence and at the close of all the evidence as to the charge of first degree burglary and felonious larceny. Defendant contends that the evidence failed to show that defendant was the perpetrator. We disagree.

The standard for ruling on a motion to dismiss is "'whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.'" *State v. Hargett*, ___ N.C. App. ___, ___, 559 S.E.2d 282, 285 (2002) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). Evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference that may be drawn. *Id.* The trial court determines whether substantial evidence exists for each element of the offense charged. *Id.* Substantial evidence consists of "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)). The trial court looks to the sufficiency of the evidence to carry the case to the jury and not to the weight of the evidence. *Id.* "The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct." *Id.* (citing *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982)). After the court determines the sufficiency of circumstantial evidence, "'it is for

the jury to decide whether the facts, taken individually or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.'" *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E. 661, 665 (1965)).

Defendant concedes that the State satisfied its burden of proof to show that the burglary and larceny occurred. Thus, we will only address whether the evidence tended to show that defendant was the perpetrator. Byrd identified defendant as the burglar. Moore testified that she was with defendant on the night of the burglary and saw defendant enter the Byrd's home. Moore also testified that defendant told her that he had robbed the Byrds. We hold that the facts, taken in the light most favorable to the State, supported submission of the case to the jury. This assignment of error is overruled.

VI. Conclusion

We have reviewed all of defendant's assignments of error and hold that the trial court did not commit error.

No error.

Judges MARTIN and THOMAS concur.

Report per Rule 30(e).