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NO. COA02-104

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Wake County
No. 00CRS083703

ANTUWON JERMAINE CURTIS

Appeal by defendant from judgment entered 23 May 2001 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Bridgett Britt Aguirre for defendant-appellant.

McGEE, Judge.

Defendant Antuwon Jermaine Curtis was charged with robbery with a dangerous weapon. Prior to trial, defendant moved to suppress all out-of-court and possible in-court identification evidence of the prosecuting witness, Sarah Abrahams. The State and defense counsel presented stipulated evidence, after which the trial court denied defendant's motion to suppress.

The State presented evidence at trial which tended to show that at about 2:00 a.m. on 18 September 2000, Sarah Abrahams, a college student, was returning home after watching a movie at a friend's house. She parked her car in front of her apartment, near

a large streetlight. After exiting the vehicle, Abrahams began to walk towards the front door of her apartment. Abrahams heard a car pull up. When she turned around, she saw two African-American men jump out of the back seat of a white, four-door car. Each of the men had a silver handgun in his right hand. One man stood to Abrahams' right and the other to her left. The gunman to her left demanded her money and Abrahams handed her purse to the men. The armed men asked Abrahams if she had any more money, to which she responded, "No, no." The gunman to her right grabbed her, and the gunman on her left patted her down. Finding no additional money, the two armed men returned to their vehicle. Abrahams noticed two other men in the front seat of the vehicle but could not see their faces.

Abrahams telephoned the police and when they arrived approximately ten minutes later, Abrahams gave them details of the robbery. She described one assailant as an African-American man, about eighteen years old, five feet ten inches tall, but a little taller than the other robber, and weighing two hundred pounds. Abrahams noted that he was clean-shaven, of medium complexion, wearing a long-sleeved red and gray shirt with some writing on it, dark jeans, and a black hat with some sort of "do rag" underneath that concealed his hair. Abrahams described the other assailant as an African-American man, about eighteen years of age, five feet ten inches tall, and weighing two hundred pounds. Abrahams stated this assailant had short hair and a medium complexion and was wearing a black or gray fleece shirt and dark pants. She said both of the

men were carrying small handguns. Abrahams said the suspects were passengers in a white four-door automobile.

Police officers stopped a vehicle shortly thereafter, which matched the description given by Abrahams. Abrahams was taken to a nearby trailer park to identify her assailants. She immediately identified the vehicle, but due to poor lighting, was unable to positively identify the two gunmen who had robbed her. About forty-five days later, after the probable cause hearing in this case, Abrahams positively identified defendant and another person from a photographic lineup.

Defendant presented the testimony of his cousin, Courtney Antwon Shaw, who stated that he and defendant were riding around in Shaw's mother's gray Oldsmobile until approximately 12:00 or 1:00 a.m. on 18 September 2000. Shaw dropped defendant off by a "guy named Dominic's house" and then drove home.

A jury found defendant guilty as charged, and the trial court sentenced defendant to a presumptive term of seventy-two to ninety-six months imprisonment. Defendant appeals.

Defendant argues the trial court erred in denying his motion to suppress Abrahams' in-court identification of him as one of her assailants. Defendant contends that her in-court identification of him was tainted by the pretrial photographic array shown to Abrahams by the district attorney's office. We disagree.

It is well settled that 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). If 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:

"(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)).

Prior to trial, Abrahams had two opportunities to identify her assailants. The first opportunity was shortly after the early morning robbery on 18 September 2000, when police officers took her to a trailer park where the suspects and an automobile matching the victim's description had been found. Abrahams immediately identified the vehicle. Officers lined the four occupants of the vehicle in front of the police car in which Abrahams was sitting. The four suspects were illuminated by the car's headlights and officers' flashlights. Abrahams identified two of the men as the robbers, but could not identify the other two men. She stated that

she was ninety-nine percent certain that the two men she identified were the two armed men who had robbed her, but admitted she could not be one hundred percent certain due to poor lighting conditions. The second opportunity to identify the gunmen was about one and a half months later in the district attorney's office, after the probable cause hearing in this matter. The assistant district attorney wanted an explanation of what Abrahams' "almost positive" earlier identification meant. She showed Abrahams five photographs, depicting four different people. One of the front-seat passengers was depicted twice, and the remaining three photos were of the two gunmen and the other front-seat occupant. The assistant district attorney asked Abrahams, "Are the people who did this to you in these pictures?" Abrahams responded by identifying defendant and another man as the gunmen. She still could not identify the persons in the other three photographs. Abrahams commented on the difference in defendant's appearance in the photograph that she picked out, stating, "[t]his is the guy who did it, but his hair is different. He had on a cap when he did it." Abrahams also explained that she had not been one hundred percent positive about her identification at the trailer park on the morning following the incident, due to the poor lighting. She told the assistant district attorney that she did not want to unfairly identify anyone and therefore had hesitated to make a positive identification. In good lighting, however, Abrahams stated that she was one hundred percent certain about her identification of the suspects.

Defendant challenges only the pretrial photo array provided by the assistant district attorney. After a thorough review of the record, we conclude that the photo array was not impermissibly suggestive. Moreover, even if it were, we conclude that the evidence tends to show that Abrahams' identification was otherwise reliable under the factors set forth in *Harris*.

The robbery occurred in a well-lit area of the parking lot and Abrahams had a good look at the faces of both assailants. Abrahams's physical description of the assailants, their clothing, the weapons they used, and the vehicle in which they rode was very detailed. Abrahams' description was sufficiently accurate to lead the police to a quick capture of the suspects, within thirty minutes after the crime. On the first occasion that Abrahams was asked to identify her assailants, she stated that she was ninety-nine percent sure that defendant was one of the persons who robbed her. On the second occasion, which is at issue here, Abrahams stated that she was one hundred percent sure that defendant was one of the gunmen who robbed her. Finally, defendant concedes that the length of the time between the crime and the confrontation of the two armed assailants was short. The first show-up was within thirty minutes of the robbery, and the photographic array was shown to Abrahams about forty-five days later.

The facts tend to show that the photographic lineup was not impermissibly suggestive, and even if it were, Abrahams' in-court identification was of independent origin; therefore, we conclude the trial court did not err in denying defendant's motion to

suppress his pretrial and in-court identification testimony. This assignment of error is overruled.

No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).