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NO. COA02-17

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Rowan County  
No. 00 CRS 12000

JEFFERY DUANE McDANIEL

Appeal by defendant from judgment entered 13 July 2001 by Judge Michael E. Beale in Superior Court, Rowan County. Heard in the Court of Appeals 30 September 2002.

*Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for the State.*

*Woodson, Sayers, Lawther, Short, Parrot & Walker, LLP, by Sean C. Walker, for defendant-appellant.*

McGEE, Judge.

A jury found defendant guilty of robbery with a dangerous weapon, and the trial court sentenced him to 96 to 125 months' imprisonment. Defendant appeals.

State's witness TaJuana Greenard (Greenard) testified that she was working at a convenience store on Jake Alexander Boulevard in Salisbury, North Carolina on the morning of 2 July 2000. At approximately 4:00 a.m., she saw defendant exit his car and come into the store. After asking for a pack of cigarettes, defendant lifted his shirt and pulled out a black handgun wrapped in black

netting. As Greenard looked for the cigarettes, defendant said, "Well, I see you're not good at this, just give me cash." Greenard gave defendant approximately \$100.00 from the cash register. Before leaving the store, defendant said that he would come back for Greenard if she reported him to the police.

The State introduced a videotape from the store's security camera of the incident to support Greenard's testimony. Salisbury Police Detective Sheila Lingle read from a statement she took from Greenard, corroborating Greenard's account of the robbery including defendant's use of a gun with a "knit cover over it." Over defendant's objection, both Greenard and Detective Lingle testified that Greenard selected defendant's photograph from a line-up of six photographs prepared by Lingle on 14 July 2000.

Lingle arrested defendant on 2 October 2000. After waiving his *Miranda* rights, defendant gave the following written statement admitting to the robbery:

[O]n 7/2/2000 at the Amoco on Jake Alexander Boulevard around 3 a.m. or 2 a.m. [,] I went in the store and asked the clerk for [a] pack of cigarettes and then told her that I wanted all the money and that no one would be hurt if she cooperated. I never had a gun and never told her I had a gun. I just said that no one would get hurt if she cooperated. She gave me the money and I left. . . .

Defendant's statement was admitted into evidence and published to the jury.

Defendant raises several arguments on appeal. We begin our review by addressing two of defendant's claims which are not properly before this Court for review.

Defendant asserts that Greenard's in-court identification was tainted by the suggestive photographic lineup shown to her by Detective Lingle on 14 July 2000. However, defendant failed to raise this issue in the trial court and has therefore not preserved it for appeal. See N.C.R. App. P. 10(b)(1). Defendant did not object to Greenard's repeated identification of him as the robber at trial. Moreover, in seeking to exclude the photographic lineup from evidence, defense counsel argued that the lineup was unnecessarily "cumulative[,] " because Greenard had already identified him in court "just by looking" at him. Defendant has not assigned or argued plain error and has waived any challenge to Greenard's in-court identification. See N.C.R. App. P. 10(c)(4).

Defendant also argues that Officer Ross Hagler was allowed to read from the police dispatcher's report to corroborate Greenard's testimony that the robber had a gun. Defendant avers that the report was hearsay and that he was denied his constitutional right to confront the dispatcher, who did not testify at trial. However, defendant waived his objection to the police dispatcher's report by not objecting to the State's rebuttal witness, Detective Lingle, reading the report to the jury. Defendant also did not object to the report being admitted into evidence and published to the jury. "The admission of evidence without objection . . . waives *prior or subsequent* objection to the admission of evidence of a similar character." *State v. Jones*, 137 N.C. App. 221, 232, 527 S.E.2d 700, 707 (2000) (citing *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979)). Absent an assignment of plain error,

defendant may not raise this issue on appeal. See N.C.R. App. P. 10(c)(4).

Defendant also argues that the trial court erred in admitting the results of the photographic lineup presented to Greenard on 14 July 2000. Defendant contends the lineup was unduly suggestive, because defendant's photograph is "lighter" than the other photographs which depict Hispanic or men with a dark-complexion. He further asserts that the trial court failed to consider all the factors set forth in *State v. Pigott*, 320 N.C. 96, 357 S.E.2d 631 (1987) in ruling the lineup identification admissible.

Having reviewed the case presented by the State at trial, we conclude that defendant has not shown a possibility of prejudice arising from the trial court's admission of the photographic lineup. The State presented overwhelming evidence of defendant's identity as the perpetrator of the robbery. Defendant also signed a written statement admitting to the robbery and corroborating Greenard's account thereof. Moreover, as discussed above, Greenard identified defendant in open court as the robber. In light of the evidence presented, there was no realistic possibility of a different outcome at trial had the results of the photographic lineup not been admitted. See N.C. Gen. Stat. § 15A-1443(a) (1999); see also *State v. Butler*, 331 N.C. 227, 237, 415 S.E.2d 719, 724-25 (1992). We also note that defendant authorized his counsel to concede his participation in the robbery and to contest only the issue of the use of a gun.

In a related argument, defendant contends that the State

violated the discovery statute, N.C. Gen. Stat. § 15A-903(d), by failing to provide him with a copy of the photographic lineup prior to trial. As a result, defendant insists he "is entitled to an outright dismissal of the charge against him, or in the least the right to a trial de novo" as a sanction under N.C. Gen. Stat. § 15A-910. However, defendant did not request a continuance or recess from the trial court to review the lineup, nor did he move for a dismissal or mistrial under N.C. Gen. Stat. § 15A-910(2), (3a), and (3b). Although it appears from the record that defendant was not shown the composition of the lineup until trial, he was able to raise a timely objection to its admissibility on *voir dire*, arguing that the other men depicted in the lineup were either Hispanic or had dark complexions. Because he did not ask for additional time to review the evidence before proceeding with the *voir dire*, defendant cannot fault the trial court for failing to provide it. *Cf. State v. Ginn*, 59 N.C. App. 363, 374-75, 296 S.E.2d 825, 832-33 (1982).

Defendant also was not prejudiced by the State's oversight in light of the other evidence establishing defendant's identity as the robber. Defendant argues that he adopted a trial strategy "focused on issues other than identification" without knowing the suggestive nature of the lineup showed to Greenard on 14 July 2000. This claim is factually untenable. Defendant signed a written confession at the time of his arrest, a decision unaffected by the discovery process. Moreover, defense counsel acknowledged to the trial court that he was notified of the lineup's existence during

discovery but had not pursued the matter:

I think the notes that I received from Detective Lingle had mentioned she showed the lineup [to Greenard,] but I had not seen anything. I figured since [the lineup] was not given to me that it probably was not going to be released into evidence but I hadn't given it much thought . . . .

At the conclusion of the *voir dire* hearing, defendant's counsel reiterated, "Your Honor, obviously, I'm not implying that [the State] withheld [the lineup] from me at all. I know that I was aware there was this lineup . . . ." Thus, defendant knew of the lineup's existence when forming his trial strategy but deemed its contents immaterial. Contrary to his assertion on appeal, defendant objected only to the lineup's introduction into evidence, not to any taint it might have cast on Greenard's in-court identification. Even after he obtained a copy of the lineup, defendant did not challenge Greenard's in-court identification testimony. Instead, he argued that Greenard's in-court identification made the evidence of the lineup unnecessarily "cumulative."

Defendant's final argument challenges the trial court's admission of alleged hearsay testimony, including Greenard's testimony relaying an out-of-court statement made by a friend who had visited her at the store just prior to the robbery. Greenard described her friend's statement as follows: "He's like what are you doing here working third shift by yourself. This is dangerous and why aren't you afraid and all that." Defendant argues the trial court erred in overruling his objection to this evidence as

hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (1999). Assuming, *arguendo*, that the statement was hearsay, defendant was not prejudiced by its admission because it did not add to the State's case. The fact that Greenard's solitary, late-night job may have been dangerous as an abstract proposition did not implicate defendant in the robbery.

Defendant also argues that a statement read by Officer Hagler to the jury was inadmissible hearsay. The statement was from a police department dispatch report, which stated the suspect "showed the clerk what she [thought was] a handgun wrapped in a sock." The trial court admitted the statement, allowing it to be considered by the jury as corroborative or impeachment evidence in judging the credibility of Greenard.

Defendant contends the statement was offered for the purpose of proving the truth of the matter asserted in the statement, being that defendant had a gun. Defendant argues that the "source or writer" of the statement did not testify. Defendant therefore did not have the opportunity to confront and cross-examine the person who actually prepared the report, which unduly prejudiced him. However, the statement in the report was not hearsay in that it was admitted to show that Greenard had stated in her call to the police department that the suspect used a gun; it was not admitted to prove that defendant had a gun wrapped in a sock. The trial court

appropriately gave a limiting instruction allowing the jury to consider the statement in determination of Greenard's credibility. Greenard testified several times that she believed defendant used a gun to rob her. The trial court did not err in admitting the statement from the dispatch report. This assignment of error is without merit.

The record on appeal contains an additional assignment of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(5), we deem it abandoned.

Defendant received a fair trial free from prejudicial error.  
No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).