NO. COA02-193

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

STATE OF NORTH CAROLINA

v. Pitt County
Nos. 00 CRS 51444-46

DEMETRIUS TELFAIR

Appeal by defendant from judgments entered 15 June 2001 by Judge Dwight L. Cranford in Superior Court, Pitt County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Roy A. Giles, Jr., for the State.

Brian Michael Aus for defendant-appellant.

WYNN, Judge.

Following his convictions for robbery with a dangerous weapon of a Burger King restaurant and two counts of kidnapping of its employees, defendant presents two issues on appeal: (1) Did the trial court err by denying his motion to dismiss the charges against him due to insufficient evidence, and (2) Did the trial court err by allowing the State to ask leading questions during the examination of one of its witnesses. We dismiss the first issue because defendant failed to preserve it, and uphold the trial court's decision on the second issue. Accordingly, we uphold

defendant's conviction and concurrent sentences of 80 to 105 months on the consolidated kidnapping charges and 61 to 83 months on the robbery charge.

Defendant first argues that the trial court erred by denying his motion to dismiss because there was insufficient evidence identifying him as the perpetrator of the robbery and kidnapping. However, we decline to review the assignment of error. Defendant moved to dismiss the case at the close of the State's evidence but after it was denied, presented his own evidence. "Appellate Rule 10(b)(3) states when defendant presents evidence at trial, he waives his right on appeal to assert the trial court's error in denying the motion to dismiss at the close of the State's evidence." *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997). Furthermore, defendant failed to renew his motion to dismiss at the close of the evidence. "[A] defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial." *State v. Spaugh*, 321 N.C. 550, 552, 364 S.E.2d 368, 370 (1988). Accordingly, this assignment of error is dismissed.

Defendant next argues the trial court committed plain error by permitting the State to propound leading questions to Laura Hines, who was an employee at the Burger King during the robbery. Hines had seen a television report on the robbery in which defendant's picture was shown, and testified that when she saw the picture, "that's when it dawned on me. I said I felt - - you know, it was like I couldn't believe it was somebody I knew, you know." The

State then asked Hines:

> do you remember telling Detective Candler that you worked with [defendant] for six months side by side, and that you recognized him by his eyes; and you said there was no doubt in your mind that it was [defendant] who robbed you?

Hines answered, "Yes." The State then asked if Hines "believe[d] that [defendant] was the tall man in the Burger King with you?" Hines replied, "I do." Defendant contends that the leading questions were impermissible and "shifted Hines' opinion of the defendant's identity as the perpetrator from at best questionable to absolute certainty."

After careful review of the record, we decline to review defendant's assignment of error. First, defendant did not object to the State's question or move to strike. Thus, he waived his right to assign error on appeal. *State v. Walston*, 67 N.C. App. 110, 113, 312 S.E.2d 676, 678 (1984). Furthermore, even if defendant had objected, defendant subsequently elicited the same testimony from Hines on cross-examination. Thus, again, any purported error was waived. *See State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989)(benefit of objection lost when same or similar evidence has been admitted or is later admitted without objection); *State v. Moses*, 316 N.C. 356, 362, 341 S.E.2d 551, 555 (1986) (benefit of defendant's objection to introduction of letter lost when defendant later read from letter). Accordingly, we find no error.

Dismissed in part, no error in part.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).