NO. COA01-498

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

STATE OF NORTH CAROLINA

v.

TIMOTHY MAQUEL DAVIS

Rowan County
Nos. 95 CRS 1321
95 CRS 1323
95 CRS 1735

Appeal by defendant from judgments entered 22 August 1996 by Judge Thomas W. Seay, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 31 December 2001.

Attorney General Roy Cooper, by Assistant Attorney General Clinton C. Hicks, for the State.

R. Marshall Bickett, Jr. for defendant-appellant.

EAGLES, Chief Judge.

Defendant Timothy Maquel Davis was charged with assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and attempted murder. The evidence tends to show that on the night of 13 December 1994, defendant secreted himself inside of the A & P grocery store, also known as Save-A-Center, in Kannapolis, North Carolina. At about 6:25 a.m. on the next morning, Tommy Wayne Plyler, the store's co-manager, and James W. Hall, the meat department manager, arrived at the grocery store to start work. Plyler proceeded to the store's

office to do some bookkeeping and Hall went directly to the back of the store towards the meat department. After entering the office, Plyler looked up to see defendant pointing a gun at him. Defendant had a metal bar in his other hand, and ordered Plyler to open the safe. When Plyler was unable to open the safe, defendant ordered Plyler to hand over his wallet, whereupon defendant extracted the sixty dollars it contained and dropped the wallet onto the floor. Defendant then let Plyler escape to the back of the store, where he observed Hall, laying on the floor with a serious head injury.

Hall was subsequently treated at the Carolinas Medical Center for his injuries. Despite having undergone brain surgery and receiving further treatment for more than a year for his head injury, Hall has been unable to return to work as a meat cutter because his mind does not "work fast enough" as a result of his injuries. Hall has no recollection of the incident in question. At trial, Eric Mills testified that defendant told him that he had hidden in the A&P grocery store until it closed, stayed overnight, and later pointed his gun at some people in the store. Mills' wife, Leona, testified that she overheard defendant tell her husband that he had been locked in the A&P grocery store one night. On or about 26 January 1995, defendant made certain statements to Detectives M.D. Davis and Tony Gulledge, of the Kannapolis Police Department, admitting to being involved in the 14 December 1994 robbery of the A & P grocery store.

The jury subsequently found defendant guilty as charged. After arresting judgment on the assault with a deadly weapon with

intent to kill conviction, the court sentenced defendant to consecutive sentences of 115-147 months imprisonment for the robbery with a dangerous weapon conviction, and 243-301 months imprisonment for the attempted first degree murder conviction. Defendant appeals.

At the outset, we note that appellate counsel has failed to comply with our appellate rules. First, counsel has failed to paginate the record on appeal, in violation of N.C.R. App. P. 9(b)(4). More importantly, counsel failed to indicate in defendant-appellant's brief (or for that matter, in the record on appeal) which assignment of error his respective argument is based upon, or the page in the record or transcript that the error occurred, in violation of N.C.R. App. P. 28(b)(5). While counsel's failure to comply with our appellate rules ordinarily would subject this appeal to dismissal, N.C.R. App. P. 25(b), defendant is a criminal indigent and is entitled to an appeal of his convictions. Therefore, we elect to address the merits of defendant's arguments on appeal.

On appeal, defendant first argues that the trial court erred in allowing into evidence the statements of the victim's attending physician made to the victim's wife. Defendant contends that the physician's statements regarding the victim's injuries were "clearly hearsay," and were "not admissible under any of the twenty-four exceptions to the hearsay rule." We note, however, that defendant has lost the benefit of his objection to the admission of the statements in question because subsequent

testimony by the attending physician about the nature and extent of the victim's injuries was allowed into evidence without objection. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). Accordingly, this argument fails.

Defendant next argues that the trial court erred in allowing into evidence the statement made by defendant to Detective Davis. We disagree.

It is well established that before a confession can be legally obtained from a suspect, who is in custody and who is interrogated, the suspect must receive *Miranda* warnings. *See State v. Campbell*, 133 N.C. App. 531, 536, 515 S.E.2d 732, 736, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). Irrespective of whether *Miranda* warnings are required or given, the Fourteenth Amendment to the United States Constitution requires that a statement be voluntary in order to be admissible, with the State having "the burden of proving, by a preponderance of the evidence and examined in context with the totality of the circumstances, that the statement was voluntary." *Id.* at 537, 515 S.E.2d at 737. The following factors are to be considered in determining whether a suspect's statement is voluntary:

> whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. at 538, 515 S.E.2d at 737 (quoting *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994)).

Here, defendant was in the Cabarrus County jail when he called the Kannapolis Police Department and told Detective L.W. Blume that he had some information to give the detective. In response, Detective Blume traveled to the jail and picked up defendant. The detective then took defendant back to the police station, where he read defendant his *Miranda* rights. Defendant did not, however, offer any helpful information as to the investigation of the A & P robbery.

Detective Gulledge subsequently escorted defendant to the restroom and then allowed him to step outside the police station to smoke a cigarette. At this time, without any questioning or prompting, defendant said, "I did the A & P." Defendant then slammed the door in Detective Gulledge's face and ran. Detective Gulledge chased defendant and eventually overtook and subdued him. Defendant was returned to the station, secured in handcuffs and shackles, and laid on the floor. Because defendant appeared to be in respiratory distress, and stated that he was about to throw up, Detective Davis sat defendant in a chair with a trash can in front of him. Defendant twice threw up, and subsequently told Detective Davis, "I have to tell you something." The officer reminded defendant that he was still in custody and that he had the right to remain silent, but defendant continued, telling Detective Davis that he had robbed the A & P grocery store, along with "Eric, and another guy."

We conclude that the totality of the circumstances here tends to show that defendant's statements to Detective Davis were voluntary. While defendant was in custody at the local jail, he voluntarily contacted the police department about some information he had, and after being informed of his *Miranda* rights, disclosed this information. Defendant's attempt to escape while at the police station brought about a pursuit. His subsequent capture, return and eventual restraint by police officers were a result of defendant's actions, and were not motivated by a desire of the officers to extract information from defendant. The fact that defendant subsequently suffered some respiratory distress and threw up prior to giving his inculpatory statement does not negate the voluntariness of his statements to Detective Davis.

Even if the contrary were true, defendant cannot show prejudicial error in the admission of his statements to Detective Davis in light of his earlier admission of involvement in the robbery to Detective Gulledge. In addition, Eric Mills testified at trial that defendant told him that he had robbed the A&P store. Mills' wife also testified that she overheard defendant tell her husband about being locked in the A&P grocery store all night. Accordingly, this argument is unpersuasive.

In light of the foregoing, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).