NO. COA05-1124

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Durham County
Nos. 03 CRS 054523
03 CRS 054524
03 CRS 054525

PAUL DEVON JOYNER,

Defendant.

Appeal by Defendant from judgment entered 27 January 2005 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 19 April 2006.

Roy Cooper, Attorney General, by John C. Evans, Assistant Attorney General, for the State.

L. Jayne Stowers for Defendant-Appellant.

STEPHENS, Judge.

Defendant appeals from the trial court's order denying his motion to suppress statements he made to the police and from judgment and sentencing upon conviction of two counts of assault with a deadly weapon inflicting serious injury and one count of assault with a deadly weapon. He brings forward assignments of error one and three and voluntarily abandons the remaining assignments. For the reasons which follow, we find no error.

I.FACTUAL AND PROCEDURAL BACKGROUND

The appeal in this case stems from a gun fight involving Defendant during the late night hours of 26 August or the early morning hours of 27 August 2003. The evidence relevant to our determination was presented at the 18 January 2005 suppression hearing regarding statements made by Defendant to Durham police officers while he was being treated for a gunshot wound, and a trial between 19 January and 27 January 2005, which tends to show the following:

On 26 August 2003, Kam Russell left his home between 9:30 p.m. and 10:00 p.m. to walk to a local convenience store. On his way back from the store, a car slowly approached him because the driver wanted to speak with him. As the car approached Russell, he heard someone in the back seat of the car ask the driver not to stop the car, and to keep going because the back seat passenger had a "beef" with Russell.[1] Russell identified the voice as Defendant's and then looked in the back seat of the car and was able to visually confirm that Defendant made the statement.

After the car drove away, Russell continued walking home and soon came upon a group of people gathering in an alley. There were between seven and nine people in the group. Included in the group were Ricky Alston and DaWayne Bailey. After stopping to talk for ten to fifteen minutes, Russell continued to walk home. Soon after Russell left the group, Defendant came from behind a tree, and with

[1]During his testimony, Russell described a "beef" as a conflict involving more than a verbal confrontation.

a gun in his left hand, started to run at Russell.[2] As Defendant approached Russell, he stated, "Don't move." When Russell saw that Defendant had a gun, he backed up and reached to his right hip to retrieve his gun. As Russell moved for his weapon, Defendant shot at him. Russell shot back at Defendant and retreated towards the crowd. During the gun battle, Russell was struck with a bullet, as were Ricky Alston and DaWayne Bailey. As a result, Russell suffered medical complications, including paralysis from the neck down. DaWayne Bailey suffered a gunshot entry and exit wound to his leg, and Ricky Alston was treated in the emergency room. Defendant was also struck with a bullet and received medical treatment at Durham Regional Hospital.

After receiving a report of the shooting in question, Officer D.C. Reaves was dispatched to 57 Truman Street, Apartment B, where he made contact with DaWayne Bailey. Bailey was conscious, alert, talking, and did not appear to have any life-threatening injuries. After leaving Bailey, Reaves was directed to report to Durham Regional Hospital to investigate another shooting subject. He was the first member of the Durham Police Department to arrive at the hospital, where he investigated the status of Defendant.

Upon entering Defendant's room, Reaves observed Defendant lying on a bed, but did not see any medical equipment attached to him. However, Reaves did notice a bandage on one of Defendant's feet. When Reaves spoke to Defendant, he introduced himself as

[2]Russell testified that he had seen Defendant with a gun on a previous occasion and that during a verbal confrontation in July 2002, Defendant stuck a gun in Russell's face.

Officer Reaves, asked Defendant for identifying information, and then asked Defendant what happened. Defendant informed Reaves that a group of guys were hanging out in an alleyway between two buildings. While they were there, an unknown vehicle drove up and unknown occupants of the vehicle started shooting at them. Defendant was unable to provide a description of the suspect, the vehicle, or the vehicle's color. After leaving Defendant, Officer Reaves responded to Duke University Medical Center to try to obtain a statement from the other three shooting subjects.

Defendant was next interviewed by Investigator Shari Montgomery, who had arrived at Durham Regional Hospital at approximately 2:00 a.m. Investigator Montgomery testified that before she arrived at the hospital, she was aware that Defendant was not only a victim, but was also a suspect in the shooting. When Montgomery entered Defendant's room, a nurse was present and Defendant was lying on the bed with his right foot bandaged.

Montgomery asked Defendant if he was in any pain, his name, date of birth, address, and what had happened. Although Defendant indicated that he was in pain, he told Investigator Montgomery that it was a drive-by shooting and an unknown person in an unknown vehicle fired some shots at him. He told Montgomery that he thought he had sprained his ankle while running away from the scene, but later realized that he had been shot. As he was running away, he flagged down a friend named Mako and asked for a ride to the hospital. Once in the car, Defendant fainted and awoke at Durham Regional Hospital. When Defendant informed Montgomery that

he had nothing else to say, she ended the conversation and left the hospital room.

At one point in their conversation, Montgomery stepped out of Defendant's hospital room and saw Crime Scene Investigator Drew King and Sergeant Jon Peter standing outside. Montgomery testified that at any given time, there were four Durham Police Department employees outside Defendant's hospital room. Although Montgomery ended her questioning of Defendant, she remained at the hospital until he was discharged and occasionally entered his room.

Sergeant Peter was the next member of the Durham Police Department to interview Defendant. On the morning of the shooting, Peter was supervising the Department's detective unit. When he was apprised of the shooting, Sergeant Peter responded to building 57 of Truman Street, where he arrived at 2:00 a.m. After assessing the situation and conducting some interviews, Peter reported to Durham Regional Hospital. When he arrived at the hospital, at approximately 3:30 a.m., Peter learned that Defendant had already given a statement to Investigator Montgomery. Sergeant Peter, however, continued with his plan to conduct an interview. Peter testified that, although possibly repetitive, it is not unusual for two to five different police employees to interview a gunshot victim.

During the interview, Defendant told Peter that he and some friends were drinking in the alley when a car drove by. The lights on the car were very bright and he heard some gunshots as the car approached. When Defendant heard the gunshots, he ran but was hit

in the ankle. Peter asked Defendant if he had any siblings and Defendant informed him that he had two brothers, Travaris[3] and Donte. When asked if he had recently fired a gun, Defendant told Peter that he had not fired a gun, but that he and his nephew had recently been shooting off fireworks. Peter obtained consent from Defendant to perform a gunshot residue collection kit.

Over the course of the morning, it became apparent that the doctors were going to release Defendant from the hospital. Defendant, however, was finding it difficult to find a ride home. When Peter ascertained that Defendant was having trouble, he told Defendant that if he could not find a ride, the police would drop him off somewhere.

Peter testified that although Defendant's leg was wrapped and he had a bandage on his hand where an IV had previously been inserted, Defendant appeared coherent, spoke fluidly without slurred speech, and Peter did not notice Defendant "nodding off" during the interview. Peter also stated that when Defendant moved, he would wince in pain. When Peter informed Defendant that there were other shooting victims, Defendant said that he did not want to talk about anything else, and Peter ended the interview.

After Sergeant Peter obtained consent for a gunshot residue collection kit to be performed on Defendant, Drew King, a crime scene investigator for the Durham Police Department, responded to Durham Regional Hospital. During the administration of the kit,

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[3]The trial transcript spells the name of Defendant's brother as Travaris and Tavaris.

Defendant was conscious and alert. King did not ask Defendant any questions about the shooting and did not collect any items of clothing from Defendant.

At approximately 5:00 a.m., Sergeant Peter informed Defendant that warrants had been taken out for his arrest and that upon discharge from the hospital, he would be taken to the magistrate's office to be charged with assault with a deadly weapon inflicting serious injury. When he was being escorted by Officer Reaves, Investigator Montgomery and Sergeant Peter from the hospital to a waiting patrol car, Defendant indicated that he wanted to speak with Sergeant Peter. Without being given *Miranda* warnings, Defendant provided a statement that Sergeant Peter wrote down[4]. Defendant told Peter:

> Kam attempted to kill me on Wabash around March or April when my wife --
> I walked around the --
> He's --
> Kam, back in March or April of 2003, first argument with Kam started over my girlfriend, Tanya O'Neill . . . and Kam's girlfriend Felicia. . . . . After that I was driving Tanya's green Honda and Kam and Pokie were on the outside and he fired about eight shots at me. I didn't report it. Kam and Pokie are Blood. I have seen him since then, but I leave if I do. Tonight I was visiting Ricky, and I get to the cut where everybody goes to drink. I was by myself. I see Kam pull a gun from his front right side. . . . . Kam's gun was a large chrome semi-auto. He fired seven times. He stated, "I got your a** now." I tried to take off behind a tree when the bullet hit me in my right ankle. I fired back with my gun, it was a 9 millimeter Glock. I got it from one of my friends 30 minutes earlier than the shooting, because I had seen

[4]Defendant did not move to suppress this statement.

> him, and he had seen me, coming from the Town and Country on Ridgeway. Word was out that he was looking for me, and I wasn't going to let anybody kill me. I fired back four shots. And then I ran. I didn't stay to see if I hit him. There were around seven people with them. I saw two or three red shirts. They are all Bloods over there. I'm not in a gang. I saw Mako in a Ford cream Taurus, and he drove me to the hospital. I don't want to get the dude in trouble who has the gun. It's not Mako. I didn't mean to shoot nobody else.

After this statement was taken, Defendant was transported to the magistrate's office where he was properly *Mirandized*, and he signed a statement indicating that what he had told Sergeant Peter outside the hospital was true.

Before trial, Defendant moved to suppress the statements he made in the hospital to Reaves, Montgomery, and Peter prior to the administration of *Miranda* rights.[5] After a *voir dire* hearing, and upon detailed findings of fact and conclusions of law, the trial court denied Defendant's motion, in an order filed 18 January 2005. The case proceeded to trial and at the end of the State's evidence and again at the end of all evidence, Defendant moved to dismiss the charges against him. These motions were denied. Defendant was found guilty of two counts of assault with a deadly weapon inflicting serious injury, as to victims Alston and Russell, and assault with a deadly weapon as to victim Bailey. Defendant was sentenced to consecutive terms of twenty-four to thirty-eight months on the charge of assault with a deadly weapon inflicting

[5]Defendant did not move to suppress other statements made to Sergeant Peter that were recorded on the back of the *Miranda* form and signed by the Defendant as his statement.

serious injury as to victim Russell, and twenty-four to thirty-eight months on the charges of assault with a deadly weapon inflicting serious injury as to victim Alston and assault with a deadly weapon as to victim Bailey. Defendant appeals.

II.QUESTIONS PRESENTED

By his first assignment of error, Defendant contends that the trial court erred when it denied his motion to dismiss the charges of assault with a deadly weapon with intent to kill inflicting serious bodily injury on DaWayne Bailey (03 CRS 54524) and on Ricky Alston (03 CRS 54523). Ordinarily, when a motion to dismiss is made, the trial court must determine if the evidence presented, when viewed in the light most favorable to the State, provides "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)(citations omitted)). As grounds for his argument on appeal, Defendant asserts that the charges should not have been submitted to the jury because the evidence was insufficient to show that he shot Alston or Bailey. Because Defendant alleged lack of specific intent and lack of serious injury at trial, this assignment of error is not properly before this Court. *See, e.g., State v. Sharpe*, 344 N.C. 190, 473 S.E.2d 3 (1996), *cert. denied*,

350 N.C. 848, 539 S.E.2d 647 (1999). On the contrary, and for the reasons which follow, this assignment of error is overruled.

The North Carolina Rules of Appellate Procedure govern the preservation of error for appellate review. The applicable rule provides:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C. R. App. P. 10(b)(1). "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotations omitted); *see also State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). When a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived. *Id.*

In the instant case, Defendant has impermissibly changed theories between the superior court and this Court. At the close

of the State's evidence, the following exchange occurred between the trial judge and Defendant's attorney:

> THE COURT: All of the jurors have now departed the courtroom.
> Any motion by the defendant?
> MR. CAMPBELL: Yes, Judge.
> At the close of the State's evidence, I will make the following motion: Move to dismiss as to each of these counts the assault with intent to kill, first, as to all three of those. I would argue that these are specific intent crimes, that there has been no evidence, even taking the evidence in the light most favorable to the state, that there was any specific intent to kill. And I would ask that portion of the charge be dismissed as for -- in each separate count.
>
> . . . .
>
> THE COURT: All right. Motion is denied. Move to the next motion.
> MR. CAMPBELL: Judge, as to the inflicting injury portion of the charges for DaWayne Bailey and Ricky Alston, I would argue to the court there is insufficient evidence to go to the jury as to serious injury -- inflicting serious injury. . . . . I would argue, based on his testimony from the witness stand, that it does not rise to the level of serious injury as contemplated by the law in the State of North Carolina.
> I would also argue the same as to Mr. Alston who did not testify, and based on the evidence that we have, we don't know that he suffered any complications, that he was required to have a number of follow-up, in fact, the custodian, Ms. Daniels, indicated that from her review of the records he was only at the emergency room that one morning, that his medical records were substantially shorter or smaller than Ricky Alston's (sic) because it was 20 pages as opposed to the 40 pages of Ricky Alston. We have no evidence of any broken bones. No evidence of surgery, no evidence of any permanent disability, lasting effect from the gunshot wound, and for that reason I would also argue that does not rise to the level of inflicting serious injury as contemplated by North Carolina law.

After this statement, the court again denied Defendant's motion to dismiss. Defendant renewed his motions at the close of all evidence and the trial court once again denied the motions.

Based on the statements of Defendant's counsel, it is clear that to support his motion to dismiss, Defendant argued to the trial court that the State failed to present adequate evidence of specific intent or the presence of serious injury, that is, that the State failed to prove these essential elements of the crimes charged. Before this Court, however, Defendant contends that the State failed to present sufficient evidence that Defendant was the person who shot DaWayne Bailey and Ricky Alston, that is, that Defendant was the perpetrator of the offenses charged. In his brief to this Court, Defendant states, "[t]he State used the theory of transferred intent to supply the element of intent to kill, but offered no evidence as to who actually shot Bailey or Alston." The brief continues, "[i]n this trial, evidence was missing that Joyner shot either Dawayne [sic] Bailey or Ricky Alston, intentionally or otherwise[,]" and "[w]ithout substantial evidence that Defendant Joyner shot Ricky Alston and Dawayne [sic] Bailey, there was insufficient evidence to survive Defendant's motion to dismiss the assault charges allegedly committed by Joyner on Alston and Bailey."

Clearly, Defendant argues a different theory for his motion to dismiss on appeal than he presented to the trial court. "This he cannot do." *Benson*, 323 N.C. at 321, 372 S.E.2d at 519 (citation

omitted). Accordingly, Defendant has waived this assignment of error.

By his third assignment of error, Defendant contends that the trial court erred when it denied his motion to suppress statements he made to the police while being treated for his gunshot wound at Durham Regional Hospital.

When this Court evaluates a motion to suppress, the trial court's findings of fact are conclusive on appeal if those findings are supported by competent evidence. *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001); *State v. Earwood*, 155 N.C. App. 698, 574 S.E.2d 707 (2003). This is true, even if the evidence before the lower court is conflicting. *Id.* (Citations and quotations omitted). Making a determination of whether a defendant was in custody and whether the defendant's statements were voluntary, however, are questions of law that are fully reviewable by an appellate court. *Id.*

In its order denying Defendant's motion to suppress, the trial court made the following pertinent findings:

> 2. Durham police investigator, Shari Montgomery, responded to a call to Durham Regional Hospital at 2:00 a.m. on 27 August, 2003. There, she spoke to Paul Joyner in room TR-10. Paul Joyner was lying in the bed and told her his name and date of birth.
> 3. At the time that Paul Joyner made those statements to investigator Shari Montgomery, Officer Reaves was outside that hospital room in the hall.
> 4. Paul Joyner had an injury to his foot that had been bandaged; there was visible to Shari Montgomery, however, a hole in the bottom of Paul Joyner's foot.

. . . .

7. While in the hospital room, Paul Joyner stated to Investigator Shari Montgomery that it was a drive-by shooting from an unknown vehicle; that he had fired some shots; that a friend had brought him to the hospital, and that he had nothing else to say.
8. Drew King, a crime scene investigator for the Durham Police Department, responded to the call of a shooting on Truman Street on 27 August 2003. He went to Durham Regional Hospital, and after confirming that consent had been given, went to Paul Joyner's room and proceeded with a gunshot residue test. He explained to Paul Joyner what he was doing, and Joyner was conscious and alert at that time. Paul Joyner made no statements to Drew King and Drew King did not collect any clothing from Paul Joyner. Upon completing the gun residue kit collection, Drew King returned to police headquarters.
9. Durham police officer, D.C. Reaves, responded to a call to Durham Regional Hospital on 27 August, 2003 and spoke there with Paul Joyner. Officer Reaves was the first police officer to arrive at the hospital.
10. Officer Reaves introduced himself to Paul Joyner, asked his name and date of birth and asked essentially what had happened.
11. Paul Joyner said to Officer Reaves that he was taken to the hospital by Macos [sic]; that a group of guys were hanging out in the alley between two buildings off Truman Street; that an unknown vehicle pulled up and started shooting.
12. Officer Reaves at no time read to Paul Joyner his Miranda rights. Officer Reaves did see a bandage on Paul Joyner's foot.
13. Sergeant Jon Peter of the Durham Police Department was on duty 27 August, 2003, and was called out in response to a shooting at 1:00 a.m.
14. Sergeant Jon Peter had Investigator Montgomery go to the hospital, and Sergeant Peter arrived at the hospital at approximately 3:30 a.m.
15. Sergeant Peter first saw Paul Joyner at the hospital at 3:40 a.m. Sergeant Peter identified himself to Paul Joyner. Paul

> Joyner stated to Sergeant Peter that his name was Paul Joyner; that he was spending time with friends; that he heard shots; that he ran; and that he was hit in the ankle.
> 16. Sergeant Peter advised Paul Joyner that law enforcement officers would drop him off somewhere. Paul Joyner said that he would take a gunshot residue test and sign a waiver to take the gunshot residue test. After the gunshot residue test, Sergeant Peter asked Paul Joyner if he had shot a firearm, and Paul Joyner responded that he had not, but that he had fired off fireworks on 26 August, 2003.

Based on a thorough review of the transcript and record herein, we believe that the trial court's findings of fact are fully supported by competent evidence. Thus, we are bound by these findings.

We turn next to the issues of custody and voluntariness. First, Defendant argues that he was "in custody" and his statements should be suppressed because he was not given *Miranda* warnings. While it is uncontested that Defendant was not given *Miranda* warnings, we are satisfied that he was not "in custody" when he made the statements in question. Consequently, *Miranda* warnings were not necessary.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, *reh'g denied*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966), the United States Supreme Court determined that in order for the prosecution to use statements made by a defendant during a custodial interrogation, the police first have to give the defendant a warning that he has the right to remain silent, that any statement he makes can be used against him, and that he has the right to have an attorney present during questioning. However, *Miranda* warnings are only required when the person being interviewed is "in custody." *Buchanan*, 353

N.C. at 337, 543 S.E.2d at 826. To determine if a person is "in custody," the Court must evaluate "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Id.* at 339-40, 543 S.E.2d at 828.

In *State v. Thomas*, 22 N.C. App. 206, 206 S.E.2d 390, *appeal dismissed*, 285 N.C. 763, 209 S.E.2d 287 (1974), this Court determined that when a defendant was interviewed by the police in the emergency room (after an automobile accident), he was not in custody for *Miranda* purposes, and therefore, *Miranda* warnings were unnecessary. The Court relied in part on the fact that the "atmosphere and physical surroundings during the questioning manifest a lack of restraint or compulsion." *Id.* at 211, 206 S.E.2d at 393. The same is true here. In this case, the police in no way restrained Defendant or kept him in the hospital against his will. They simply interviewed him while his gunshot wound was being treated and while he was awaiting release from the hospital. Moreover, when Sergeant Peter learned that Defendant was having difficulty finding a ride home, Sergeant Peter told Defendant that the police would take him home if necessary. Based on the circumstances, we do not believe that a reasonable person would have believed that he was under arrest or that Defendant was restrained in his movement to the degree associated with a formal arrest. Accordingly, we hold that Defendant was not "in custody" for *Miranda* purposes.

Next, Defendant contends that his statements were not voluntary, and thus, are inadmissible. When evaluating the voluntariness of a statement, this Court must review the totality of the circumstances under which the statement was made. *State v. Brewington*, 352 N.C. 489, 532 S.E.2d 496 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). If "the confession is 'the product of an essentially free and unconstrained choice by its maker,' then 'he has willed to confess [and] it may be used against him'; where, however, 'his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'" *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)(quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057-58 (1961))). When evaluating the voluntariness of a statement, factors to consider are (1) whether the defendant was in custody, (2) whether the defendant was deceived, (3) whether the defendant's *Miranda* rights were honored, (4) whether the defendant was held incommunicado, (5) the length of the interrogation, (6) whether physical threats or shows of violence were made by the interrogators, (7) whether promises were made to obtain the confession, (8) the familiarity of the declarant with the criminal justice system, and (9) the mental condition of the declarant. *Id.* (Citations omitted).

Defendant argues that the number of interviews conducted by the police, the presence of several Durham Police Department

employees at the hospital, the fact that the police viewed him as a suspect, and his condition as a gunshot victim make his statements involuntary. We disagree.

Defendant relies on *Mincey v. Arizona*, 437 U.S. 385, 57 L. Ed. 2d 290 (1978), to support his position. However, the facts in this case are plainly distinguishable from those in *Mincey,* and consequently, *Mincey* does not control. In *Mincey*, the Supreme Court determined that statements a defendant made were not admissible, even for impeachment purposes, because the "statements were not 'the product of his free and rational choice.'" *Id.* at 401, 57 L. Ed. 2d at 306 (quoting *Greenwald v. Wisconsin*, 390 U.S. 519, 521, 20 L. Ed. 2d 77, 80 (1968)). In making this determination, the *Mincey* Court found that the defendant had been wounded a few hours earlier and was in the intensive care unit during the officer's interrogation. *Id.* Additionally, the defendant was not able to think clearly and while he was being questioned, he was in a hospital bed, encumbered by tubes, needles and a breathing apparatus. *Id.* Moreover, the defendant's injuries were so serious that he remained in the hospital for almost a month. *Id.* In sum, the *Mincey* Court found that "[t]he statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness." *Id.* at 401, 57 L. Ed. 2d at 305.

The circumstances surrounding the statements made in this case are not similar to those in *Mincey*. In the current case, Defendant was not as seriously injured as the defendant in *Mincey*. In fact,

he was released from the hospital within hours of being shot. Additionally, there is no evidence that Defendant was receiving any medication or that he was encumbered in any way by medical equipment. Moreover, Sergeant Peter testified that Defendant was lucid and spoke clearly without slurred speech during their conversation. This testimony is uncontradicted.

In addition to Defendant's case being distinguishable from *Mincey*, using the *Hardy factors*, we hold that Defendant's statements were not involuntary. As established earlier, Defendant was not in custody; accordingly, he had no *Miranda* rights to be honored. Moreover, there is no evidence that Defendant was deceived into making his statements or that the police threatened him or made promises to secure the statements. Further, the presence of the officers at the hospital as well as the number of interviews conducted by the officers was not unusual practice when responding to and investigating a crime involving gunshot victims. Finally, the Defendant was lucid and spoke clearly during conversations with police personnel.

Based on a review of the totality of the circumstances surrounding Defendant's statements, we cannot say that his will was overborne or that the statements were not the product of his own free will. Since Defendant was not in custody and his statements were voluntary, we hold that the statements were properly admitted in evidence. This assignment of error is overruled.

For the reasons stated, we hold that Defendant received a fair trial free of error.

NO ERROR.

Judge MCGEE and HUNTER concur.

Report per Rule 30(e).