NO. COA05-1225

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 04 CRS 68329-30, 65873

PERRIE THOMAS WINDLESS

Appeal by defendant from judgment entered 24 March 2005 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 29 May 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Susan K. Nichols, for the State.

Richard E. Jester for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgment entered after a jury verdict of guilty of first-degree kidnapping, robbery with a dangerous weapon, and first-degree burglary charges. We find no error.

On 2 August 2004, defendant Perrie Thomas Windless was indicted for first-degree kidnapping, robbery with a dangerous weapon, and first-degree burglary. The case was tried at the 22 March 2005 Criminal Session of Guilford County Superior Court.

The State presented evidence at trial which tended to show the following: On 19 December 2003, at around 11:00 p.m., Juan Ramon Acevedo-Zamora fell asleep on the couch in his apartment in the

Avalon Trace apartment complex in Greensboro, North Carolina. At around 1:00 a.m., he was awakened by two men standing over him, one carrying a pistol and the other a shotgun. They told him to count to three, and then asked him "where the money was" and who else was in the apartment. Acevedo-Zamora told him he had a roommate upstairs, and one of the men woke up his roommate. After his roommate was awakened, Acevedo-Zamora was taken upstairs. Both men were made to lie face down on the floor and their feet and hands were bound with cables. The men took approximately $2,500 in cash, some jewelry and a cell phone from Acevedo-Zamora, and $3,500 in cash, a check and necklace from his roommate. After the robbery, Acevedo-Zamora did not immediately call the police because his roommate was scared and did not want to get into trouble.

On 22 December 2003, Officer Anthony Hallinan of the Greensboro Police Department was dispatched to Acevedo-Zamora's residence. Acevedo-Zamora was upset because the apartment complex had removed a stove from his apartment and replaced it with one that he felt was not as good. Officer Hallinan explained to him that there was little he could do about the situation. Acevedo-Zamora apologized, explaining that he was upset because he had recently been robbed. Acevedo-Zamora then told Officer Hallinan about the robbery. Detective Charles Isom took over the investigation and learned that in the apartment complex "we had a series of burglaries going on, doors being kicked in, individuals being robbed," including the robbery of Acevedo-Zamora. The apartment manager told Detective Isom about two individuals who fit

the description of the suspects, one of whom was defendant. Detective Isom made two photographic lineups, including the two individuals, and showed them to Acevedo-Zamora. Acevedo-Zamora emphatically identified defendant as one of the men who had entered his apartment. Defendant was arrested at his girlfriend's apartment, two doors away from Acevedo-Zamora's apartment.

Defendant was convicted of first-degree kidnapping, robbery with a dangerous weapon, and first-degree burglary and was sentenced to a term of 84 to 110 months' imprisonment. Defendant appeals.

Defendant first argues that there was insufficient evidence to sustain the conviction. Specifically, defendant contends that Acevedo-Zamora's statements contained many errors and inconsistencies, and that the manner in which the victim identified defendant was fatally flawed.

After careful review of the records, briefs and contentions of the parties, we find no error. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be

drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

In the instant case, Acevedo-Zamora identified defendant both in a photographic lineup and in court as one of the people who entered his apartment and robbed him. Although defendant argues that the manner which Acevedo-Zamora identified him was fatally flawed, he did not move to suppress the identification, nor does he assign error to the identification of defendant at trial. Except where out-of-court procedures result in an unreliable in-court identification, "it is for a jury to determine the credibility of this witness's identification of the defendant." *State v. McCraw*, 300 N.C. 610, 616, 268 S.E.2d 173, 177 (1980).

Defendant also claims that Acevedo-Zamora's statements contained errors and inconsistencies. However, on a motion to dismiss, the trial court does not weigh the evidence or determine any witness' credibility. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002); *see also State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002)("'[O]n a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.'"). *Id.* (citation omitted). Thus, we conclude that the trial court did not err by denying the motion to dismiss.

Defendant next argues that the trial court erred when it prevented him from eliciting testimony from Acevedo-Zamora describing the state of repair of the apartment where the victim

lived, as well as testimony from the apartment manager regarding the layout and location of the apartment. Defendant contends the evidence was relevant to show that Acevedo-Zamora's call to the police was regarding the condition of the apartment, and not about the robbery. Defendant further argues that the evidence would show that Acevedo-Zamora knew him and where he lived, and that he was picked out of the lineup because "he was the guy three doors down." However, in the instant case, defendant failed to make an offer of proof of what Acevedo-Zamora or Debbie Miller, the apartment manager, would have testified to, and the significance of their excluded testimony is not apparent on the record. Our Supreme Court has stated:

> "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record."

State v. Golphin, 352 N.C. 364, 462, 533 S.E.2d 168, 231-32 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *cert. denied*, 358 N.C. 157, 593 S.E.2d 84 (2004) (citations omitted). Thus, the issue has not been preserved for appellate review.

Moreover, even assuming *arguendo* that exclusion of the evidence was in error, it was not prejudicial error because it appears that the same or similar evidence was admitted at trial. Acevedo-Zamora and Officer Hallinan both testified that the reason

for the call to the police was the condition of the apartment, not the robbery. The evidence defendant claims he sought to elicit would appear to be repetitive. Additionally, Detective Isom testified that defendant lived just two doors down from Acevedo-Zamora. Thus, again, any further evidence that defendant lived near the victim would be repetitive. Accordingly, the assignment of error is overruled.

Defendant finally argues that the trial court erred by continuing proceedings in the case in his absence. We are not persuaded. "The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution '"guarantees an accused the right to be present in person at every stage of his trial."' This right to be present extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him." *State v. Chapman*, 342 N.C. 330, 337, 464 S.E.2d 461, 665 (1995) (citations omitted). "Defendant bears the burden 'to show the usefulness of his presence in order to prove a violation of his right to presence.'" *State v. Murillo*, 349 N.C. 573, 596, 509 S.E.2d 752, 766 (1998) (quoting *State v. Buchanan*, 330 N.C. 202, 224, 410 S.E.2d 832, 845 (1991)).

Here, defendant complains about two instances where the court proceeded in his absence. First, during jury deliberations, defendant was not present when the jury requested that the judge give them the criteria for each charge. The judge was inclined to print the charge as given and provide it to the jury. Defendant's counsel did not object, and the court provided the jury with the

written instructions. Defendant has made no showing of how his presence would have been useful to his defense. Thus, he has failed to prove a violation of his right to presence. *Id.*

The second instance complained about by defendant was a pre-trial conversation between the court and the prosecution regarding defendant's projected release date. However, although a criminal defendant has the right to be present at trial, "this right does not arise prior to the commencement of trial." *State v. Call*, 349 N.C. 382, 397, 508 S.E.2d 496, 506 (1998). The conversation concerning defendant's projected release date occurred prior to jury selection, and thus was "not a stage of the trial." *Id.* Moreover, even assuming *arguendo* that the conversation took place during the trial, defendant has again failed to demonstrate how his presence would have been useful to his defense. Accordingly, we find no error.

No error.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).