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NO. COA05-962

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

JOSHUA DOUGLAS GILBERT,
Defendant.

Gaston County
Nos. 04 CRS 26173
04 CRS 70285
04 CRS 70540

Appeal by defendant from judgment entered 9 May 2005 by Judge Richard Doughton in Gaston County Superior Court. Heard in the Court of Appeals 11 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Amy Y. Bason, for the State.

Haral E. Carlin for defendant-appellant.

GEER, Judge.

Defendant Joshua Douglas Gilbert appeals his convictions for attempted robbery with a dangerous weapon, possession of a firearm by a felon, and possession of marijuana. On appeal, defendant primarily argues that the trial court erred by admitting into evidence a show-up identification that was impermissibly suggestive. Based on the witness' opportunity to view defendant, the witness' degree of attention, the accuracy of the initial description, the level of the witness' certainty, and the shortness of the time between the crime and the identification, we hold that the trial court properly denied the motion to suppress.

Facts

The State's evidence tended to show the following facts. On 13 December 2004, James Scarborough, a cab driver for AAA Taxi, was dispatched between 7:30 a.m. and 8:00 a.m. to a residence on Old Mill Road in Gaston County. When Scarborough arrived, he saw a young white male, whom he later described as being between 5'6" and 5'7" tall and weighing between 150 and 170 pounds, waiting in the driveway wearing an orange pullover, blue jeans, silver-rimmed sunglasses, and a dark blue or black toboggan. The man had a "five-day growth" of facial hair.

After sitting down beside Scarborough in the front passenger's seat of the cab, the man pointed a nickel-plated handgun at Scarborough and told him to "give it up." When Scarborough said that he had no money because this was his first fare of the morning, the gunman apologized, exited the cab, and walked across the street. Scarborough followed the assailant in his car until he lost sight of him and then called the AAA dispatcher to report the incident. He estimated the man was in his cab for five minutes.

Gaston County Police Sergeant Dean Henderson responded to the scene within ten minutes. After hearing Scarborough's description of his assailant, Henderson took him to 4633 Old Mill Road to view a potential suspect, Chad Funderburk, who lived at that address. Upon seeing Funderburk, Scarborough told Henderson that he was not the gunman. Funderburk suggested to Henderson another possible suspect, who lived at 4707 Misty Hill Lane. That address was approximately 100 yards from the crime scene and in the same

direction that the assailant had walked.

The police took Scarborough to that address. Defendant's mother, Beverly Gilbert ("Gilbert"), answered the door and said that defendant was not at home. She nevertheless allowed the officers to enter the residence to look for her son. In defendant's bedroom, Henderson observed an open gun case and "a box of Winchester .45 automatic 230 grain bullets" sitting on a chest of drawers. Henderson then discovered defendant in Gilbert's bedroom on the upper level of the residence. While patting defendant down for weapons, Henderson found a bag of marijuana in his front left pocket.

With defendant seated in the living room, Henderson asked to have Scarborough brought into the room "to see if it was or was not the gentleman that robbed him." Scarborough immediately recognized defendant and identified him to the police as the person who had attempted to rob him. In addition, he identified the toboggan and sunglasses lying on a living room table as the ones worn by defendant during the robbery attempt. Later, Scarborough also identified defendant as the robber in open court.

In the course of a subsequent search of Gilbert's residence, police also found an orange fleece-type pullover jacket on the floor of a closet near defendant's bedroom. The jacket matched the description of defendant's clothing given by Scarborough. In a dresser drawer of Gilbert's upstairs bedroom, where defendant had been discovered, police also found a loaded chrome Taurus .45 caliber semiautomatic handgun. The gun closely resembled the gun

Scarborough had said his assailant used. In addition, following his arrest on the day of the crime, defendant asked Officer Sandra Fisher on three separate occasions "how could he be charged with armed robbery when he didn't get nothing; shouldn't it be attempted armed robbery."

Defendant was indicted on 7 February 2005 for attempted robbery with a dangerous weapon, marijuana possession, and possession of a firearm by a felon. On 15 April 2005, a jury convicted defendant on all charges, and the trial judge sentenced defendant to a term of 103 to 133 months imprisonment.

Motion to Suppress

On appeal, defendant first challenges the trial court's denial of his motion to suppress Scarborough's identification testimony, arguing that the "show-up" conducted in Gilbert's living room was impermissibly suggestive. Although the police's display of a single suspect to an eyewitness is generally disfavored, such procedures "are not *per se* violative of a defendant's due process rights." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982).

In evaluating the propriety of a show-up identification under the Due Process Clause, this Court must determine if the totality of the surrounding circumstances created a "substantial likelihood of irreparable misidentification" by the witness. *Id.* "An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the

identification possesses sufficient aspects of reliability." *Id.* The reliability of a show-up identification is determined by examining the following five factors:

(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and confrontation.

State v. Powell, 321 N.C. 364, 369, 364 S.E.2d 332, 335, cert. denied, 488 U.S. 830, 102 L. Ed. 2d 60, 109 S. Ct. 83 (1988).

An examination of the circumstances of Scarborough's identification of defendant indicates no significant likelihood of misidentification under *Powell*. With respect to the first factor, the evidence showed Scarborough had ample opportunity to observe his assailant. He saw the young man standing in the driveway when he arrived at Old Mill Road and then was seated next to him in the front seat of the cab for approximately five minutes while defendant was attempting to rob him. See *State v. Lawson*, 159 N.C. App. 534, 538, 583 S.E.2d 354, 357-58 (2003) (upholding identification where store clerk observed defendant's face while being held at gunpoint for approximately twenty-five seconds). Scarborough also heard his voice and watched him as he ran from the cab. See *State v. Capps*, 114 N.C. App. 156, 163, 441 S.E.2d 621, 625 (1994) (upholding a challenged identification in which the witness pursued the perpetrator).

The second criteria, degree of attention, is met by Scarborough's testimony that during the five minutes when the

assailant was in the cab, the assailant was turned toward Scarborough holding a semi-automatic handgun, and Scarborough was looking at the assailant and his gun. Further, Scarborough pursued the assailant through the neighborhood. This evidence suggests that, during his observations of defendant, Scarborough's attention was directly focused on his assailant.

Turning to the third *Powell* factor, while Scarborough's description of his assailant was fairly general in providing his sex, race, and approximate height and weight, he also included distinctive details about defendant's clothing, gun, and facial hair. Inasmuch as Scarborough's overall description substantially matched defendant, we deem it sufficiently reliable to support the identification. See *State v. Richardson*, 328 N.C. 505, 512, 402 S.E.2d 401, 405 (1991) (admitting identification when witness description included clothing and approximate height and weight of assailant).

Scarborough's certainty in identifying defendant – the fourth criteria – also weighs in favor of reliability. We find it significant that, prior to identifying defendant, Scarborough exonerated the first suspect developed by police at a similarly-conducted show-up at the Funderburk house. Moreover, we note that defendant was not displayed to Scarborough in handcuffs, in the back of a patrol car, or in any other manner suggestive of his guilt. Finally, with respect to the fifth criteria, the performance of the show-up less than one hour after the crime further bolsters the reliability of the identification. See *id.*

(upholding admission of an identification that occurred within three hours of the initial sighting).

In sum, we hold that the totality of the circumstances indicate that Scarborough's identification possessed sufficient reliability that there is not a substantial likelihood of misidentification. Accordingly, we hold that the trial court did not err by denying defendant's motion to suppress and admitting Scarborough's identification of defendant into evidence.

Amendment of Indictment

Defendant next contends that the trial court erred by allowing the prosecutor to amend the indictment charging him with possession of a firearm by a convicted felon under N.C. Gen. Stat. § 14-415.1 (2005). The indictment in this case originally alleged that defendant was a felon based on a prior conviction on 28 February 2001 in Gaston County Superior Court for the Class F felony of assault inflicting serious bodily injury committed on 20 June 1999. The conviction was further identified by Superior Court file number 99 CRS 20646. At trial, over defendant's objection, the State sought to amend the indictment to allege that the prior conviction occurred on 17 October 2002 and was for the Class E felony of assault with a deadly weapon inflicting serious injury. The amendment did not change the date that the prior offense was committed or the file number, 99 CRS 20646, for the conviction.

The trial judge asked counsel for the defendant if he and his client were aware that defendant had been "convicted of a felony assault on that file number," and counsel acknowledged that they

were aware. Counsel further conceded that he and his client were "not substantially surprised" by the change sought by the State. On appeal, however, defendant argues that, by changing the nature and felony classification of the prior conviction alleged in the indictment as well as the alleged date of conviction, the amendment "materially and substantially altered the indictment," in violation of N.C. Gen. Stat. § 15A-923(e) (2005).

N.C. Gen. Stat. § 15A-923(e) provides that "[a] bill of indictment may not be amended." This statute, however, has been interpreted to forbid only those changes "'which would substantially alter the charge set forth in the indictment.'" *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984) (quoting *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, appeal dismissed and disc. review denied, 294 N.C. 737, 244 S.E.2d 155 (1978)). An indictment must provide "sufficient detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense in violation of the prohibitions against double jeopardy." *State v. Burroughs*, 147 N.C. App. 693, 695-96, 556 S.E.2d 339, 342 (2001). "A change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735, disc. review denied, 351 N.C. 111, 540 S.E.2d 370 (1999).

This Court has already held, with respect to an indictment charging a defendant with possession of a firearm by a felon, that

a change in the date of the prior felony conviction is not a material alteration of the indictment, inasmuch as the date of the prior conviction is mere surplusage. See *State v. Inman*, __ N.C. App. __, __, 621 S.E.2d 306, 309 (2005) ("[T]he date of a defendant's prior conviction is immaterial so long as defendant is sufficiently apprised of the conduct for which he is being indicted."). Likewise, a change in the felony classification of the prior conviction does not materially alter an indictment charging a violation of N.C. Gen. Stat. § 14-415.1. See *Inman*, __ N.C. App. at __, 621 S.E.2d at 309 ("'[T]he provision of [N.C. Gen. Stat. §] 14-415.1(c) that requires the indictment to state the penalty for the prior offense is not material and does not affect a substantial right' because a defendant 'is no less apprised of the conduct which is the subject of the accusation than he would have been if the penalty for the prior conviction had been included in the indictment.'" (quoting *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004))).

The gravamen of a charge under N.C. Gen. Stat. § 14-415.1 is the present possession of a gun by one previously convicted of a felony. Therefore, the fact that defendant's prior felony conviction was for a type of felonious assault different from that originally alleged in the indictment does not substantially alter the instant offense of unlawful possession of a firearm. Moreover, the indictment properly notified defendant of the superior court file number corresponding to the prior conviction, as well as the date he committed the prior crime. See *State v. Lewis*, 162 N.C.

App. 227, 285, 590 S.E.2d 318, 324 (2004) (upholding a habitual felon conviction even though the date and county of prior conviction were incorrect on the original indictment).

Further, defendant acknowledged to the trial court that the indictment provided notice of the particular prior conviction at issue and that he was not misled or surprised by the State's amendment. Accordingly, because the amendment neither substantially altered the charge contained in the indictment, see *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (upholding a conviction despite an amendment to the indictment changing the type of deadly weapon used), nor surprised or otherwise prejudiced defendant's ability to defend the charge, see *State v. McNair*, 146 N.C. App. 674, 677, 554 S.E.2d 665, 668 (2001) (holding that defendant could not have been "misled or surprised" by an amendment correcting typographical errors as to the victim's name in the indictments), this assignment of error is overruled.

Insufficiency of the Evidence

In his remaining argument, defendant challenges the trial court's denial of his motion to dismiss the charge of robbery with a dangerous weapon based on the insufficiency of the evidence. In reviewing the denial of a defendant's motion to dismiss, we must determine whether the evidence, viewed in the light most favorable to the State, would allow a reasonable jury to find the defendant guilty of each essential element of the charge beyond a reasonable doubt. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80, 120 S. Ct. 95

(1999).

Under N.C. Gen. Stat. § 14-87 (2005), "an armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property." *State v. May*, 292 N.C. 644, 649, 235 S.E.2d 178, 182, cert. denied, 434 U.S. 928, 54 L. Ed. 2d 288, 98 S. Ct. 414 (1977). An attempted armed robbery is complete when a person with the requisite intent to deprive another of property commits an overt act calculated to achieve that end. *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996).

Here, defendant contends that the State failed to establish the non-consensual element of the taking, arguing that "[t]he State never asked Scarborough [whether] the attempt to rob him or take cash from his presence was without his consent." We hold, however, that the evidence that defendant made his demand for Scarborough to "give it up" while pointing a .45 caliber handgun at him was sufficient to support a reasonable inference that defendant attempted to take Scarborough's property non-consensually by the use or threatened use of a dangerous weapon. The trial court, therefore, properly denied defendant's motion to dismiss.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).