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NO. COA06-215

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

Lincoln County  
Nos. 04 CRS 052946 - 052947

BLAIR QUINCY BROOKS

Appeal by defendant from judgments entered 15 August 2005 by Judge Robert C. Ervin in Lincoln County Superior Court. Heard in the Court of Appeals 29 September 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Robert R. Gelblum, for the State.*

*William D. Auman, for defendant-appellant.*

TYSON, Judge.

Blair Quincy Brooks ("defendant") appeals from judgments entered after a jury found him to be guilty of two counts of robbery with a dangerous weapon. We find no error.

#### I. Background

The State's evidence tended to show during the early morning hours of 14 October 2004 a man approached Zachary Pilkington ("Pilkington") and Jeremiah Ross ("Ross") and asked whether they wanted to purchase marijuana as they sat at a picnic table outside a restaurant. Pilkington responded that he wanted to buy marijuana. Pilkington and Ross entered an automobile with the man,

whom they later identified as defendant, and rode to a mobile home occupied by Todd Wilson ("Wilson") on Car Farm Road. The three men entered Wilson's home, where Pilkington and Wilson consumed marijuana. Pilkington asked defendant whether he could also obtain methamphetamine. Defendant responded that he could obtain the drug for the price of \$120.00. Pilkington agreed to the price and exchanged currency with Ross to arrive at the exact amount. Pilkington and defendant left the mobile home in defendant's vehicle. Defendant drove down a road, suddenly stopped the vehicle, pointed an automatic pistol at Pilkington's head, and demanded Pilkington's wallet. After Pilkington gave defendant his wallet, defendant ordered Pilkington out of the vehicle and drove away, leaving Pilkington on the side of the road.

Defendant returned to Wilson's mobile home, where Ross had remained. Defendant ran into the house, fired a gun toward Ross's leg, and demanded his wallet. The two men engaged in a struggle, during which defendant pulled Ross's pants down in an effort to remove the wallet. Defendant ultimately stole Ross's wallet and ordered him to leave the mobile home. Nude from the waist down, Ross ran out of the mobile home to a neighboring home. The residents of the neighboring home gave Ross underwear and called law enforcement.

Lincoln County Deputy Sheriff Matt Wise ("Deputy Wise") received a call at 5:07 a.m. on 14 October 2004 to report to a residence located at 653 Car Farm Road. Deputy Wise spoke to Ross, who reported that he had been across the road inside Wilson's home,

where a black male identified as "Blair" or "Andre" fired a gun and robbed him of his wallet. Deputy Wise and other officers went to Wilson's home, where they found two shell casings fired from a ten millimeter weapon: one in the living room near the front door; the other in a bedroom adjacent to the living room. They also found bullet holes in the floor of the living room and in a wall behind the bedroom door.

At daybreak, Pilkington began walking back toward Wilson's mobile home. Lincoln County Sheriff Sergeant Robert Hooks found Pilkington walking along Car Farm Road and transported him to Wilson's house, where he was reunited with Ross.

Lincoln County Sheriff Detective Sally Dellinger ("Detective Dellinger") met the other officers at Wilson's mobile home. In addition to taking statements from Ross and Pilkington, Detective Dellinger interviewed Wilson, who identified the suspect by the name of "Blair Brooks." Detective Dellinger traveled to defendant's residence and spoke to defendant's father, who provided her with a school yearbook photograph of defendant. Detective Dellinger showed the photograph to Ross, Pilkington, and Wilson. All three men identified the male pictured in the photograph as the perpetrator.

Defendant presented an alibi defense through the testimony of his girlfriend, who testified he was present at her residence on the night of 13 October 2004.

On 14 March 2005, defendant was indicted for robbery with a dangerous weapon and assault with a deadly weapon with intent to

kill. At trial, defendant moved to suppress the in-court identification testimony and to dismiss the charges against him. The trial court denied both motions. A jury found defendant to be guilty of two counts of robbery with a dangerous weapon. Defendant appeals.

## II. Issues

Defendant contends the trial court erred by denying: (1) his motion to suppress the in-court identification testimony on the ground the testimony was the product of an unduly suggestive photo identification procedure in violation of his rights to due process and (2) his motion to dismiss due to insufficiency of the evidence.

## III. Standard of Review

Appellate review of a denial of a motion to suppress by the trial court is "limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Defendant has not assigned error to any of the trial court's findings of fact. The trial court's findings of fact are binding on appeal. The sole question for this Court is whether the trial court's findings of facts support its conclusions of law. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

## IV. Identification

"Identification evidence must be excluded as violating a

defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). The practice of showing a suspect singly to a witness for the purpose of making identification is considered an inherently and unnecessarily suggestive identification procedure. *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982).

While this practice is disfavored, it does not violate *per se* a defendant's due process rights if, under the totality of the circumstances "the identification possesses sufficient aspects of reliability." *Id.* Identifications made from showup identification procedures have been approved by our appellate courts on numerous occasions. *In re Stallings*, 318 N.C. 565, 569, 350 S.E.2d 327, 329 (1986). Factors to be considered in determining whether the identification is reliable include: (1) the opportunity of the witness to observe the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of a prior description by the witness; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the identification. *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 (1988).

In ruling on defendant's motion to suppress, the trial court made the following relevant findings of fact:

10. . . . [Pilkington and Ross] rode with [defendant] to Todd Wilson's residence. It took approximately five to ten minutes to drive to Mr. Wilson's house.

. . . .

12. Pilkington was sitting approximately one to two feet away from [defendant] on the way to Wilson's residence and he could see [defendant] during the ride . . . .

13. When they arrived at Wilson's residence, all three men went inside . . . .

14. The lights were on inside Wilson's trailer and Pilkington remained at the trailer for approximately 20 to 25 minutes. The interior of the trailer was well lighted.

. . . .

19. . . . [Defendant] then pulled out a silver automatic and pointed it at Pilkington's head. [Defendant] asked Pilkington for his wallet. . . .

20. Pilkington was in the car with the driver for between ten to fifteen minutes.

. . . .

22. Wilson saw [defendant] come back inside the trailer and fire a shot. Wilson saw [defendant] grab [Ross's] wallet and observed them start scuffling. . . .

. . . .

25. During the struggle, Ross was face to face with [defendant] at times.

. . . .

27. Detective Dellinger showed Pilkington a picture of one individual the afternoon after the robbery. . . .

28. . . . Pilkington indicated that he had no doubt that the defendant was the person who robbed him.

. . . .

30. Detective Dellinger showed Ross a picture the afternoon after the robbery and Ross indicated the person in the photo [defendant]

was the person who robbed him. . . . Ross indicated that it was "a hard face to forget when it ruins your life."

31. Todd Wilson told Detective Dellinger that the driver's name was Blair and indicated that Brooks came to his house with the two white males. Wilson told Dellinger that Brooks lived in Lincolnton on Flint Street. . . .

Applying the factors in *Powell* to its findings of fact, the trial court made the following conclusions of law:

1. The showing of only one photograph to Wilson, Pilkington and Ross was unnecessarily suggestive as the State conceded in this case.

2. Identification procedures, which are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate a defendant's right to Due Process.

3. To determine the suggestiveness of pretrial identification procedures, a court determines whether the totality of the circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice.

4. Even if a pretrial procedure is suggestive, that suggestiveness rises to an impermissible level only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification.

. . . .

6. In this instance, the witnesses had ample opportunity to view the perpetrator of the robberies. Both Pilkington and Ross rode in a car with the perpetrator to Wilson's trailer. Both Pilkington and Ross spent almost a half hour with the perpetrator inside the well-lighted trailer. Pilkington rode with the perpetrator for an additional five to ten minutes seated beside him in the car. Ross had an opportunity to observe the perpetrator again at the trailer during the robbery

itself. Wilson had an opportunity to observe the perpetrator at his trailer for at least twenty-five minutes.

7. Both Pilkington and Ross focused a significant degree of attention on the perpetrator of the robberies while the robberies occurred and also during the time that they dealt with him about obtaining access to controlled substances. Wilson had a heightened degree of awareness when the perpetrator entered his trailer with a gun and fired a shot inside his trailer.

8. There is no evidence in the record concerning the defendant's height or weight and it is difficult to ascertain the accuracy of Ross' description of the perpetrator. Pilkington's description of the perpetrator was so limited that the accuracy of the prior identification could not be assessed. Wilson correctly described facts about the defendant including the location of his residence and the type of car that would be parked at the residence.

9. Wilson indicated a level of certainty in his identification by giving details leading to the identification of the defendant. Both Ross and Pilkington indicated their certainty that the defendant was the person who robbed them.

10. The display of the photographs was conducted within one day of the perpetration of the robberies.

The trial court's findings of fact support its conclusions of law that the identification testimony was sufficiently reliable and was not the result of irreparable misidentification. This assignment of error is overruled.

#### V. Motion to Dismiss

By his remaining assignment of error, defendant contends the court erroneously denied his motion to dismiss due to insufficiency of the evidence. Defendant argues that without the identification



testimony, no evidence links him to the crimes.

When a court rules upon a motion to dismiss, it is required to review the State's evidence in the light most favorable to the State and to disregard conflicts and discrepancies therein. *State v. Mize*, 315 N.C. 285, 290, 337 S.E.2d 562, 565 (1985). The court considers all of the evidence that is actually admitted, whether competent or incompetent, that is favorable to the State. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975). Pilkington, Ross, and Wilson all identified defendant as the perpetrator. The court admitted their identification testimony into evidence. Based upon their testimonies, a jury could reasonably find that defendant perpetrated the crimes. The trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

#### VI. Conclusion

The trial court's unchallenged findings of fact support its conclusion that the identification testimony was sufficiently reliable. Since the identification testimony was properly admitted, the trial court did not err in denying defendant's motion to dismiss. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).