NO. COA06-99

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. Wake County
No. 04 CRS 6892

TIMOTHY EDWARDS ROGERS

Appeal by defendant from judgment entered 29 September 2004 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 13 November 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Ted Williams, and Assistant Attorney General Melissa H. Taylor, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for defendant-appellant.

LEVINSON, Judge.

On 8 March 2004, defendant Timothy Edwards Rogers was indicted for robbery with a dangerous weapon. The case was tried at the 28 September 2004 Criminal Session of Wake County Superior Court.

The State presented evidence at trial which tended to show the following: On 3 February 2004, Juan Guttieras was working at the Kroger supermarket on Six Forks and Wake Forest Road in Raleigh, North Carolina. Guttieras was getting ready to go home when he heard an alarm and saw the defendant leaving the store with a cart.

Guttieras followed the defendant outside the store and asked to see a receipt for the items in the cart. Defendant replied that he had left the receipt inside and did not want to go back inside the store to get it. Guttieras, believing the items in the cart had been stolen from the store, asked defendant to return the groceries and leave. Defendant refused. Defendant then pushed the cart against Guttieras and made a motion to pull something out of his pockets. Guttieras backed away and saw "something shiny coming out." Defendant then told Guttieras to back away or "I'm going to cut you." Guttieras backed away from defendant and let him go. Another employee of the store called 911.

Officer Brian Romell of the Raleigh Police Department responded to the 911 call. Guttieras told Officer Romell what happened and described the defendant. Guttieras also pointed out a vehicle on the side of the store that he felt was "odd." A short time later, Officer Romell noticed the same vehicle, a red pickup truck, on McNeal Street. Officer Romell made eye contact with the driver and testified that the driver "had like a deer in the headlight look." Officer Romell attempted to stop the vehicle and the truck tried to elude him. Eventually, defendant crashed the truck and attempted to elude the officer on foot. However, Officer Romell caught defendant and placed him under arrest. Upon inspection of the defendant's truck, officer found a Kroger shopping cart and merchandise. Defendant was also returned to the Kroger store where he was identified by Guttieras as the same man he had attempted to stop earlier. Guttieras identified defendant

again at trial.

Defendant was convicted of robbery with a dangerous weapon and was sentenced to a term of 133 to 169 months imprisonment. Defendant appeals.

Defendant first argues that the trial court committed plain error by allowing Guttieras to testify about the show-up identification, and then by allowing Guttieras to identify defendant in court based on the show-up identification. Defendant contends that the show-up identification was impermissibly suggestive and resulted in a substantial likelihood of misidentification. Defendant asserts that the error constituted plain error because the identification was a critical component of the State's case. We are not persuaded.

Defendant did not move to suppress the identification, nor did he object at trial, so he couches his argument as plain error. "A plain error is one 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002)(quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)). It is to be applied cautiously and only in the exceptional case where the error is so prejudicial, that justice cannot have been done. *State v. Baldwin*, 161 N.C. App. 382, 388, 588 S.E.2d 497, 503 (2003) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

Here, defendant claims that Guttieras' pre-trial

identification of him was so suggestive as to deny him his constitutional due process rights, and to constitute plain error. This Court has stated that:

> If defendant can show the pretrial identification procedures were so suggestive as to create a substantial likelihood of irreparable misidentification, the identification evidence must be suppressed. While show-up style identifications are disfavored, they "are not *per se* violative of a defendant's due process rights." We use a totality of the circumstances test in making this determination. The factors to be considered in this inquiry are:
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> (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. Lawson, 159 N.C. App. 534, 538, 583 S.E.2d 354, 357 (2003) (quoting *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982)) (citations omitted). Here, the evidence demonstrates that Guttieras engaged defendant in conversation during the commission of the crime, giving him an opportunity to observe the defendant. Guttieras gave officers a description of the defendant, and also pointed out a truck in the parking lot that he suspected belonged to defendant. Defendant was arrested a short time later in the same truck identified by Guttieras. A Kroger shopping cart was recovered from the back of the truck, as well as stolen merchandise. Defendant was then taken back to the store where he was positively identified by Guttieras. At the time of the identification, only a short time had passed since the robbery.

Based upon a consideration of the totality of the circumstances, we cannot conclude the trial court erred by allowing the out-of-court identification. "Since the out-of-court identification was admissible, there is no danger it impermissibly tainted the in-court identification." *Id.* at 539, 583 S.E.2d at 358 (quoting *State v. Grimes*, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-95 (1993)). Guttieras' in-court identification of defendant was therefore admissible. This assignment of error is overruled.

Defendant next argues that the trial court erred by adding a point to his prior record level when it did not submit to the jury the issue of whether all the elements of his offense were included in one of his prior convictions. *See Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004); N.C. Gen. Stat. § 15A-1340.14(b)(6) (2005) ("If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point."). We disagree.

This Court recently decided this particular issue against defendant. In *State v. Poore*, 172 N.C. App. 839, 616 S.E.2d 639 (2005), we held that "neither *Blakely* nor *Allen* preclude the trial court from assigning a point in the calculation of one's prior record level where 'all the elements of the present offense are included in [a] prior offense.'" *Id.* at 843, 616 S.E.2d at 642 (quoting G.S. § 15A-1340.14(b)(6)). Accordingly, we overrule defendant's assignment of error.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).