NO. COA07-1132

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA,
Plaintiff,

v.

ANTONIO BERNARD BALDWIN
and SHAWN RAY BALDWIN,
Defendants.

Forsyth County
No. 06CRS064553
06CRS064554
06CRS064555
07CRS3829

Appeal by defendants from judgments entered on or about 10 May 2007 by Judge Ronald E. Spivey in Superior Court, Forsyth County. Heard in the Court of Appeals 5 March 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Philip A. Tefler and Assistant Attorney General Philip A. Lehman, for the State.

Brock, Payne & Meece, P.A., by C. Scott Holmes for defendant-appellant Shawn Baldwin.

Mark Montgomery, for defendant-appellant Antonio Baldwin.

STROUD, Judge.

Defendant Shawn Baldwin pled guilty to possession of a firearm by a felon and was convicted by a jury of robbery with a dangerous weapon. Defendant Antonio Baldwin was convicted by a jury of possession of a firearm by a felon and robbery with a dangerous weapon. Defendants appeal. The issues before us on appeal are whether the trial court (1) committed plain error in admitting an inherently suggestive identification, (2) erroneously instructed

the jury on both the doctrine of recent possession and on flight, and (3) erred in not admitting evidence regarding information related to illegal drugs. For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show the following: On 27 December 2006, around 9:00 p.m., Serderius Karlos Dunlap ("Dunlap") walked from his work to Chestnut Plains apartments ("Chestnut Plains") pushing his bike and carrying food and a black bag which contained his work clothes. As Dunlap was in the "drive area" of Chestnut Plains he was approached by defendants, Antonio Bernard Baldwin ("Antonio") and Shawn Ray Baldwin ("Shawn"), who asked Dunlap if he was "looking for something." The defendants then pulled their guns, walked Dunlap around a corner, and robbed him. Defendants took Dunlap's bag and his wallet which contained fourteen or fifteen dollars, a social security card, an identification card, and a bank card. After the robbery Dunlap ran to a store and called the police. Dunlap described defendants as having "crooked" eyes. The police arrived within approximately one minute.

Officer Robert Moore ("Officer Moore") heard the description of defendants and began looking for them in his patrol car. Antonio saw Moore's patrol car and "he started to back track to a fence[.]" Officer Moore got out of his car and drew his weapon; Shawn went to the ground while Antonio fled. Officer Tommy Jones ("Officer Jones") apprehended Antonio attempting to hide behind a

vacant house. The officers found two guns and Dunlap's bag in close proximity to where defendants were arrested. Shawn also had fourteen dollars on his person. Dunlap identified both defendants as his assailants in the area where they were apprehended. In his own defense, Shawn also testified at trial and claimed that he and Antonio met Dunlap for a drug deal that fell apart but that they did not rob him.

On or about 5 February 2007, Shawn and Antonio were indicted for robbery with a dangerous weapon, and Antonio was indicted for possession of a firearm by a felon. On or about 9 April 2007, Shawn was indicted for possession of a firearm by a felon. On or about 9 May 2007, Shawn pled guilty to possession of a firearm by a felon. On or about 10 May 2007, a jury convicted both defendants of robbery with a dangerous weapon and Antonio of possession of a firearm by a felon. Shawn was sentenced consecutively for 12 to 15 months for his guilty plea to possession of a firearm by a felon and 77 to 102 months for his conviction of robbery with a dangerous weapon. Antonio was sentenced consecutively for 103 months to 133 months for his conviction of robbery with a dangerous weapon and 13 to 16 months for his conviction of possession of a firearm by a felon. Defendants appeal.

The issue before this Court on both Shawn's and Antonio's appeals is whether the trial court committed plain error in admitting an inherently suggestive identification. The issue before this Court on solely Shawn's appeal is whether the trial court erroneously instructed the jury on both the doctrine of

recent possession and on flight. The issue before this Court solely on Antonio's appeal is whether the trial court erred in not admitting evidence regarding information related to illegal drugs.

II. Identification

> Plain error is an error that is so fundamental as to result in a miscarriage of justice or denial of a fair trial. A defendant must demonstrate not only that there was error, but that absent the error, the jury probably would have reached a different result.

State v. Cunningham, ___ N.C. App. ___, ___, 656 S.E.2d 697, 699 (2008) (internal citations and internal quotation marks omitted) (quoting *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000); *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)).

A. Shawn

Shawn first argues "the trial court committ[ed] plain error in admitting an in[-]court identification tainted by an inherently suggestive 'show-up' identification in violation of defendant's constitutional right to due process[.]" Shawn contends that the "identification procedure" was inherently suggestive because only defendants were shown to Dunlap for identification purposes. For the following reasons, we disagree.

> 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) (internal citations and internal quotation marks omitted) (quoting *State v. Powell*, 321 N.C. 364, 369, 364 S.E.2d 332, 335 (1988); *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982)) (citing *State v. Fisher*, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987); *State v. Grimes*, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-95 (1983)).

In *Lawson*, the facts were such that

> the robbery lasted approximately twenty-five seconds and defendant stood immediately in front of Johnson with a gun pointed at Johnson's face. Johnson testified that he looked right at defendant during the robbery, taking special notice of defendant's eyes. Johnson gave a description of defendant, acknowledging that although a bandana was covering the lower part of defendant's face, he recognized defendant's eyes, nose, and distinctive forehead. Defendant also gave other descriptions of defendant's clothing and a comparative description of the other man in the store during the robbery, as well as the gun used in the robbery. Defendant was arrested while wearing a jumpsuit and white tennis shoes like Johnson had described. . . . .
>
> Upon seeing defendant at the police station, Johnson was certain that defendant was the man who had held him at gunpoint in the Pantry. . . . . At the time of the identification, only a few hours had passed since the robbery.

Id. at 538-39, 583 S.E.2d at 357-58. Upon these facts this Court determined "[b]ased on the totality of the circumstances, we do not believe there was a substantial likelihood of irreparable misidentification[,] and thus evidence of the out-of-court identification was admissible. 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.

Considering the factors to determine the totality of the circumstances we note that here: (1) the robbery took place over approximately forty-five seconds to a minute compared to only twenty-five seconds in *Lawson*; (2) similar to *Lawson*, the robbery was a face-to-face close proximity confrontation and Dunlap could see defendants' faces and specifically the distinctive characteristics of their eyes; (3) also as in *Lawson*, defendants matched the physical description provided by Dunlap; (4) Dunlap positively identified defendants as his assailants without hesitation; and (5) the passage of time between the robbery and confrontation was apparently very brief as the police arrived within a minute of Dunlap's phone call and defendants were apprehended within approximately a quarter of a mile from where the robbery took place and had been traveling by foot. *See id.* at 538-39, 583 S.E.2d at 357-58.

We conclude that, as in *Lawson*, "[b]ased on the totality of the circumstances, we do not believe there was a substantial likelihood of irreparable misidentification[,] and thus evidence of

the out-of-court identification was admissible. Since the out-of-court identification was admissible, there is no danger it impermissibly tainted the in-court identification." *See id.* at 539, 583 S.E.2d at 358. As both of the identifications were admissible, we do not find plain error. This assignment of error is overruled.

B. Antonio

Antonio presents the same issue as Shawn to this Court in arguing, "[t]he trial court committed plain error in admitting into evidence the identification of the defendants by the complaining witness inasmuch as this was the result of inherently suggestive showups." Additionally, Antonio argues that his counsel was ineffective in failing to move to suppress or object to the testimony regarding identifying defendants. We disagree.

As the facts are the same for both Shawn and Antonio we determine here also that the out-of-court and in-court identifications were both admissible and there was no plain error with admitting them. *See id.*

Furthermore,

> The Sixth Amendment of the United States Constitution guarantees an accused a right to counsel in criminal prosecutions. This right to counsel includes the right to the effective assistance of counsel. In order to establish that trial counsel was ineffective, defendant must show: (1) that his counsel's performance was deficient under the circumstances of the case; and (2) that he suffered prejudice from the inadequate representation.

State v. Calhoun, ___ N.C. App. ___, ___, 657 S.E.2d 424, 426 (2008) (internal citations omitted) (citing *Strickland v.*

Washington, 466 U.S. 668, 80 L.Ed. 2d 674 (1984); *State v. Grooms*, 353 N.C. 50, 64, 540 S.E.2d 713, 722 (2000)).

Here Antonio cannot show "that he suffered prejudice" from his counsel's failure to move to suppress or object to the testimony, as we have already determined that the testimony was admissible. This assignment of error is overruled.

III. Jury Instructions

Shawn contends the trial court erred when it instructed the jury on the doctrine of recent possession and on flight.

> The standard of review for jury instructions is well-established:
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> This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.
>
> When reviewed as a whole, isolated portions of a charge will not be held prejudicial when the charge as a whole is correct. The fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal.

State v. Glynn, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554 (internal citations, internal quotation marks, ellipses, and brackets omitted) (quoting *State v. McWilliams*, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971)), *disc. rev. denied*, 360 N.C. 651, 637 S.E.2d 180 (2006).

A. Doctrine of Recent Possession

Shawn argues,

> In the present case, the only property that Defendant possessed when he was arrested was "fourteen dollars." There was nothing uniquely identifying about this currency, and Mr. Dunlap never identified these dollars as being his. In fact, he testified that he had fourteen or fifteen dollars. Under these circumstances it was erroneous for the Court to instruct the jury on the doctrine of recent possession as applied to Defendant. There was no evidence that the property found on the Defendant was unique or identifiable by the victim.

Even assuming *arguendo* that the court did err in instructing the jury on the doctrine of recent possession, this error was not prejudicial as the jury was presented with overwhelming evidence of Shawn's guilt which included: eye witness testimony, accurate description of the distinctive characteristics of defendants' eyes to police, in and out-of-court identifications, Shawn's close proximity to the crime scene, and two guns and Dunlap's bag which were found in close proximity to where defendants were arrested. *See* N.C. Gen. Stat. 15A-1443(a) (2005) ("A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."); *Glynn* at 693, 632 S.E.2d at 554. We conclude that it was not prejudicial error for the trial court to instruct the jury on the doctrine of recent possession. This assignment of error is overruled.

B. Flight

Shawn also contends it was error for the trial court to instruct the jury on the issue of flight as it was Antonio, and not

Shawn, who fled from the police. However, pursuant to the analysis *supra* we again find that even assuming *arguendo* that the trial court erred in instructing the jury on flight this error was not prejudicial as there was overwhelming evidence of Shawn's guilt. *See* N.C. Gen. Stat. 15A-1443(a); *Glynn* at 693, 632 S.E.2d at 554. This assignment of error is overruled.

IV. Admission of Evidence

Lastly, Antonio argues that "the trial court erred in sustaining the State's objections to the question posed witnesses regarding the use of 'blunts', regarding the significance of several males standing around a certain location at night and regarding whether the scene of the alleged crime was a drug area."

Antonio's brief states,

> During the state's case-in-chief, the defendants attempted to elicit through cross-examination of police officers 1) that the area in question was the site of routine drug activity, 2) that "Blunts" like the one found in Dunlap's bag, are commonly used to smoke marijuana, and 3) that the presence of several young black men standing around the apartments where Dunlap met Antonio and Shawn was indicative of on-going drug commerce.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not

admissible." N.C. Gen. Stat. § 8C-1, Rule 402. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403.

As to the crime scene being a known drug area, we find that this evidence is relevant as it tends to make it more probable that defendants' version of the incident as a drug deal gone bad, rather than a robbery, would be believed. *See* N.C. Gen. Stat. § 8C-1, Rule 401. However, Officer Moore testified that the Chestnut Plains area is "an area where drugs are readily available," and Officer Jones testified that it is "an area where there's a lot of drug transactions taking place[;]" thus evidence of the area being the "site of routine drug activity" was admitted during trial and denial of defendant's further evidence on this same issue was not prejudicial. *See* N.C. Gen. Stat. § 15A-1443(a); *State v. Hodges*, 296 N.C. 66, 71, 249 S.E.2d 371, 373 (1978) ("The exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, or the evidence is thereafter admitted, or the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence."). This assignment of error is overruled.

As to the use of blunts, we also find this evidence relevant, as it too tends to make defendants' version of the incident as a

drug deal gone bad more probable. *See* N.C. Gen. Stat § 8C-1, Rule 401. However, again, we conclude that the error in not allowing further testimony as to the use of blunts was not prejudicial as Shawn was allowed to testify to their use. *See* N.C. Gen. Stat. § 15A-1443(a); *Hodges* at 71, 249 S.E.2d at 373. The jury heard testimony from both Dunlap and Shawn and apparently believed Dunlap's version of events. This assignment of error is overruled.

As to the issue of "the presence of several young black men standing around the apartments where Dunlap met Antonio and Shawn [being] indicative of on-going drug commerce[,]" defendant failed to make an offer of proof as he did for the other two issues, and thus is precluded from review on this issue on appeal. *See State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) ("In 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. . . . [T]he essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred." (brackets omitted) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985))). This assignment of error is overruled.

V. Conclusion

For the foregoing reasons we conclude defendants' trial was free from prejudicial error.

NO ERROR.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).