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NO. COA07-1197

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 06CRS054973, 008762

DAVID LEE MILLS

Court of Appeals

Appeal by defendant from judgment entered 27 June 2007 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 21 April 2008.

Slip Opinion

Attorney General Roy A. Cooper, III, by Assistant Attorney General Steven M. Arbogast, for the State.

Haral E. Carlin for defendant-appellant.

HUNTER, Judge.

Defendant appeals from a judgment entered upon his conviction for second degree burglary, larceny, and habitual felon status. After careful review, we find no error.

The State's evidence tended to show that in April 2006, defendant's mother and older brother lived in apartment #2 of a four-unit apartment building at 5578 Becks Church Road in Winston Salem, North Carolina. Pamela Gail Henry lived beside defendant's mother and brother in apartment #1. Wesley Edwood Moore lived in the house adjacent to the apartments at 5568 Becks Church Road.

On the afternoon of 20 April 2006, defendant knocked on Moore's door, introduced himself as "David Mills[,]" and told Moore that his mother and brother had moved into the apartment building next door and "that he needed to get some money to buy some groceries for his mother and brother and needed something to eat[.]" After attempting to sell a $100.00 Wal-Mart credit card to Moore for $80.00, defendant asked whether he would pay for merchandise if defendant went to Wal-Mart and purchased it with the card. Moore declined both offers but gave defendant $20.00. Defendant thanked Moore for the money and said that he would "take care of" him.

At approximately 3:30 p.m. on 20 April 2006, Henry left Winston-Salem and traveled to Fayetteville State University to visit her daughter. She returned home the following evening.

At 2:00 a.m. on 21 April 2006, Moore was awakened by the sound of his "doorbell ringing and carrying on[.]" He found defendant at the door "trying to pawn or sell jewelry." Defendant had "earrings and some other things" in his hands and was acting in a "very hyper" manner. When Moore refused to buy the jewelry, defendant jumped down from Moore's porch and returned in less than one minute carrying a portable television "with the cord still dragging the ground." Moore asked defendant to leave his premises and called the police. Winston-Salem Police Officer Kymberli Oakes responded to his house at approximately 3:00 a.m. Moore told her "that a black male came up and tried to sell him a TV[.]" They walked over to the apartment building and discovered that the glass had been

broken out of the back door of apartment #1. Oakes found a tire iron was lying near the apartment door and "several items of clothing, a jewelry box, a television set, VCR, [and] DVD player" piled together at a wooded area to the left of the building. Entering the apartment, Oakes saw clothes strewn on the floor and indicia of objects removed from the living room. On a dresser in the apartment's bedroom was an open jewelry box with two mismatched earrings.

After calling for a crime scene technician, Officer Oakes drove down Becks Church Road until it turned into Hanes Mill Road, canvassing for suspects. She stopped to speak to defendant, who was walking down the 100-block of Hanes Mill Road. Defendant told Oakes that he was looking for his brother. After informing defendant that she needed to talk to his brother about another break-in, she returned to the apartment building. Fifteen to twenty minutes later, defendant appeared and asked for "a ride to Indiana Avenue because that's where he thought his brother was." Oakes arranged for Officer Temeka Smith to take defendant to look for his brother but asked him, "'[b]efore you get into [Smith's] car, . . . is there anything on you that I need to know about?'" Defendant responded by emptying the contents of his pockets onto the trunk of the car. Among the items defendant produced were a remote control, an earring, and a two-sided pendant with pictures of John F. Kennedy and Martin Luther King. When asked who was depicted in the pendant, defendant replied, "'[i]t's my uncle.'"

Oakes sent Officer Smith into the apartment to determine if the earring in defendant's pocket matched one of the earrings in the bedroom. Once Smith confirmed the match, Oakes arrested defendant and placed him in the rear of her patrol car. She returned to Moore's house at approximately 5:00 a.m. and informed him that she had arrested a suspect. Moore walked over to Oakes' car, peered into the back seat, and positively identified defendant as the man who tried to sell him the jewelry and television set at 2:00 a.m. Moore also identified defendant in open court at trial.

Henry learned of the burglary upon her return home on the evening of 21 April 2006. She gave Oakes a description of the jewelry, television set, and other items stolen from her apartment. She later identified the items recovered by Oakes on the morning of 21 April 2006 as her missing property.

On appeal, defendant claims the trial court committed plain error, and violated his constitutional right to due process, by allowing Moore to identify him in court as the man who tried to sell him the jewelry and television set on 21 April 2006. Defendant contends that Moore's in-court identification was tainted by an impermissibly suggestive pretrial identification procedure used by Officer Oakes. Defendant avers that he was displayed individually to Moore while seated in the back of a police car and after Oakes told Moore that she had arrested a suspect, thereby creating "a very substantial likelihood of irreparable misidentification."

Initially, we note that defendant did not move to suppress the pretrial identification or object to this evidence at trial. N.C.R. App. P. 10(b)(1) (requiring a timely objection to preserve an issue for appellate review); *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) ("constitutional error will not be considered for the first time on appeal"). Defendant likewise raised no objection, constitutional or otherwise, to Moore's in-court identification. Accordingly, we review the in-court identification only for "plain error" under N.C.R. App. P. 10(c)(4). In applying the plain error standard, we will not disturb a trial's outcome except in "'the exceptional case where, after reviewing the entire record,'" we find error "'"so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]"'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations omitted).

"Both the United States Supreme Court and our Supreme Court have criticized the practice of a 'show-up': showing suspects to victims and witnesses singularly rather than as part of a lineup." *State v. McMillian*, 147 N.C. App. 707, 710, 557 S.E.2d 138, 141 (2001), *disc. review denied*, 355 N.C. 219, 560 S.E.2d 152 (2002). However, the use of a show-up procedure is "'not *per se* violative of a defendant's due process rights.'" *State v. Lawson*, 159 N.C. App. 534, 538, 583 S.E.2d 354, 357 (2003) (citation omitted). "Moreover, it is well established that even if a pretrial identification procedure is violative of a criminal defendant's constitutional rights, a subsequent in-court identification of

independent origin is admissible." *State v. Buckom*, 126 N.C. App. 368, 376, 485 S.E.2d 319, 324, *cert. denied*, 522 U.S. 973, 139 L. Ed. 2d 326 (1997). Among the factors we consider in determining the "independent origin" of an in-court identification are the following:

> "'[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.'"

State v. Riggs, 62 N.C. App. 111, 114, 302 S.E.2d 315, 317 (1983) (alteration in original) (citations omitted). Because defendant never challenged the admissibility of the identification evidence, the court had no occasion to develop a detailed record of the circumstances surrounding the pretrial identification on *voir dire*. *See Buckom*, 126 N.C. App. at 376, 485 S.E.2d at 324-25.

Assuming, *arguendo*, that the show-up procedures used by Officer Oakes were impermissibly suggestive, we find that Moore's in-court identification of defendant was independent of the pretrial identification. *Id.* Moore testified that he had two substantial exchanges with defendant within a twelve-hour period. On each occasion, defendant came to Moore's door and attempted to sell him unwanted merchandise. The first of these conversations took place in broad daylight and involved a substantial give-and-take between the two men, during which defendant introduced himself by name. When Moore spoke to defendant at 2:00 a.m., his stoop was illuminated by two porch lights "which g[ave him] a good light."

Moore further averred that he had "no problem whatsoever" in seeing defendant on his porch and "no problem seeing [him] inside the patrol vehicle" when Oakes returned to his house approximately three hours later. Moore also had "had no problem identifying" defendant. Although defendant emphasizes that Moore did not provide Oakes with a detailed description of the man who tried to sell him the television set, we note that Moore had neither witnessed nor been the victim of a crime at the time he called the police. Under the totality of the circumstances, we find no error by the trial court in admitting the in-court identification. *See Riggs*, 62 N.C. App. at 114, 302 S.E.2d at 317. Accordingly, defendant cannot establish plain error under Rule 10(c)(4).

No error.

Judges McCULLOUGH and STEELMAN concur.

Report per Rule 30(e).