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NO. COA08-1109

NORTH CAROLINA COURT OF APPEALS

Filed: 21 July 2009

STATE OF NORTH CAROLINA

Wake County
No. 06 CRS 56806

v.

DONALD EUGENE JAMES

Appeal by defendant from judgment entered upon a jury verdict 26 February 2008 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 25 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General Anne G. Kirby, for the State.

William B. Gibson, for defendant-appellant.

CALABRIA, Judge.

Donald Eugene James ("defendant") appeals the judgment entered upon a jury verdict finding him guilty of attempted robbery with a dangerous weapon. Defendant argues the in-court identification of defendant as the perpetrator was inherently and impermissibly tainted by suggestive pretrial identification procedures. We find no error in the trial court.

The State's evidence at trial indicated that on 5 July 2006, Cheryl Futris ("the victim"), was getting items out of the back of

her van while parked in a Wal-Mart parking lot in Knightdale. The defendant approached the victim from behind and took her purse out of the van. The victim then chased the defendant to his vehicle, and upon catching up with him, a struggle ensued for the purse. During the struggle, the defendant threatened the victim, wielding a knife towards her. The defendant eventually relinquished the purse, got in his vehicle, and drove away.

Two eyewitnesses saw at least portions of the assault take place. Norm Fournier ("Mr. Fournier"), who had never met the defendant, testified that he saw the attack take place in its entirety from the moment defendant started towards the victim's van. Mr. Fournier's testimony indicated that he was only a short distance away while he observed the assault. Michelle Keely ("Ms. Keely") testified that she observed the victim struggle with the defendant. Although her testimony indicated she did not have a clear view of the attacker, Ms. Keely was able to give the police a partial license plate number from the defendant's vehicle as he drove away from the scene.

Several hours after the attack, members of the Knightdale Police Department ("the police") showed the victim a photo array that included a four-year-old photo of the defendant. The other individuals in the photographs all had the same general skin tone and hair type as the defendant. The first eyewitness, Mr. Fournier, was also shown a photo array the day of the assault, which included the same four-year-old photo of the defendant that had been shown to the victim. Although the victim was unable to

identify the defendant as her assailant at that time, Mr. Fournier, without any additional prompting, was able to immediately identify the defendant as the attacker.

An arrest warrant for the defendant was issued on 5 July 2006. It was served shortly after midnight on 6 July 2006 at the mobile home park where the defendant lived. Defendant was in a mobile home with Yvonne Bowers ("Ms. Bowers") and her two children. It took approximately thirty minutes for Ms. Bowers and her children to exit the mobile home, and an additional thirty minutes of negotiations before the defendant surrendered to police. After his arrest, the defendant was photographed by the police.

Following his arrest, defendant was read his rights and provided the police with a signed waiver of these rights. During the interview that followed, defendant told police that he had control of the suspect vehicle the previous day and that "he would take responsibility for all of it, and that Ms. Bowers had no knowledge of anything."

When the victim returned to the police station on 6 July 2006, she was shown the photograph of the defendant taken the previous evening. This photo was a single photo of the defendant and was not part of a photo array. The photo featured the defendant with the same hairstyle, facial hair, and shirt he was wearing at the time of the attack.

Further investigation led to the discovery of the vehicle used to flee the scene of the assault, which the defendant admitted to

borrowing from a friend. The license plate of the vehicle matched the description given to the police by Ms. Keely. When the police searched the vehicle, they discovered a knife that the victim was able to identify as the knife that the defendant used in his assault. The defendant was subsequently charged with armed robbery with a dangerous weapon.

Prior to trial, defendant filed a "Motion to Suppress Pretrial Identification" and a "Motion to Suppress Statements of the Defendant." The trial court denied both motions. At trial, defendant renewed both motions and they were again denied. The jury returned a verdict of guilty to the charge of attempted robbery with a dangerous weapon. Defendant was sentenced to a minimum term of 117 months to a maximum term of 150 months in the North Carolina Department of Correction. Defendant appeals.

Defendant argues that both the single photo identification by the victim as well as the photo array identification by Mr. Fournier tainted the subsequent in-court identifications of defendant, resulting in violations of the defendant's due process rights such that a new trial must be granted. We disagree.

Defendant has properly preserved the evidentiary record by submitting a motion to suppress and objecting to the evidence of pretrial and in-court identifications of the defendant made by the victim and one of the State's eyewitnesses, Mr. Fournier. "On review of a motion to suppress evidence, an appellate court determines whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the

conclusions of law." *State v. Haislip*, 362 N.C. 499, 666 S.E.2d 757, 758 (2008). "The trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *Id.* at 500, 666 S.E.2d at 758 (Citations omitted). The trial court's conclusions of law are reviewed *de novo*. *Id.*

Both parties to the appeal agree *Neil v. Biggers*, 409 U.S. 188, 34 L. Ed. 2d 401 (1972), provides the factors that a court should consider when evaluating the likelihood of eyewitness misidentification. These include: 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; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and the confrontation. Accord, *State v. Pigott*, 320 N.C. 96, 99-100, 357 S.E.2d 631, 633-34; *State v. Mettrick*, 54 N.C. App. 1, 9, 283 S.E.2d 139, 144 (1981). Additional factors may also be included as part of the *Biggers* analysis. See *Simmons v. United States*, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 1253 (1968).

Defendant suggests three possible factors which would create substantial risks of misidentification. According to the defendant, the State's two witnesses had a minimal opportunity to view the perpetrator at the time of the crime, their degree of attention was questionable, and there was virtually no level of certainty at the time of the confrontation demonstrated by the victim.

The trial court's order does not make findings of fact on these three factors, with the exception of Finding of Fact 10, from which the defendant appeals. The other uncontested findings are binding on this Court. There appears in the record no transcript of the suppression hearing. Therefore, no record of the evidence before the judge at the time of the suppression motion exists. However, the motion was renewed at trial and there is sufficient evidence in the record to support the trial court's conclusion that there was no misidentification of the defendant.

There is competent evidence in the record that the victim and Mr. Fournier saw the crime take place and had an adequate opportunity to observe the defendant. At the time of the attack, Mr. Fournier was within a few feet of the assailant. Mr. Fournier never doubted his identification of the assailant as the defendant from the first array shown to him by the police until the time he testified at trial.

Defendant, in his brief, speculates that the police, in presenting photographic evidence to Mr. Fournier, "being human . . . could well have provided inadvertent or even intentional verbal or non-verbal cues" to suggest that the photograph of the defendant was the man they had in custody. This argument is unsupported by the evidence and does not rise above the level of speculation.

The victim testified that she observed the defendant sitting in his car before he approached her. After the defendant grabbed her purse, she chased him around her car struggling to get her purse back. Her testimony was that she looked up and saw the

defendant with a knife in his hand. "I saw him, I knew what he looked like. I've never forgotten what he looked like today. . . I'm 100 percent positive it was him. No doubt in my mind whatsoever he's not the person that attacked me." The victim was in doubt on two other occasions, at both the first array of photographs and the second array of photographs. She also testified that she had "tunnel vision" on her purse at the time of the attack. Only when she was shown the sole photograph taken of the defendant after he was arrested was she able to make a positive pretrial identification. Although this evidence is conflicting, it is the province of the judge and the jury to draw conclusions from it, and this Court is bound by their findings.

While there are potential problems with the victim's testimony, removing this testimony would not be fatal to the State's case. Even assuming, *arguendo*, that the pretrial identification of the defendant by the victim was impermissibly subjective, and further assuming that these improper procedures created a substantial likelihood of irreparable misidentification, such that the victim's identification testimony would be considered error, it is harmless error.

An error in the admission of evidence made by the trial court is deemed harmless if the remaining evidence is sufficient to secure a conviction beyond a reasonable doubt. "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the improperly admitted evidence is so insignificant by comparison, that it is clear beyond a reasonable

doubt that the improper use of the incompetent evidence was harmless error." *State v. Knight*, 282 N.C. 220, 228, 192 S.E.2d 283, 288 (1972). Even without the victim's identification testimony, there is substantial remaining evidence that proves defendant's guilt beyond a reasonable doubt. The defendant was properly identified by an eyewitness, who was standing only a few feet away while the assault was taking place. Testimony provided by another eyewitness was able to connect a vehicle that linked the defendant to the assault. By the defendant's own admission, he was in control of the suspect vehicle during the entire time frame that surrounded the attack. When the vehicle in question was searched, a knife matching the description of the weapon used in the assault was discovered. Taken together, this properly admitted evidence overwhelmingly supports the defendant's conviction beyond a reasonable doubt.

The record evidence provides an adequate factual foundation for the witnesses' opportunity to observe the defendant and the sufficiency of the witnesses' attention. The weighing of these factors does not suggest that the identifications were so suggestive as to create a risk of misidentification under our present case law. Although the defendant argues that a new governing standard for the admissibility of identification evidence is needed, such a determination is not within the purview of this Court.

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to

N.C.R. App. P. 28(b)(6) (2007), we deem them abandoned and need not address them.

No error.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).