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NO. COA08-191

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v.

Johnston County
Nos. 06 CRS 8035, 8042

GLENN HOWARD SMITH, JR.

Court of Appeals

Appeal by defendant from judgment entered 21 September 2007 by Judge Jerry Cash Martin in Superior Court, Johnston County. Heard in the Court of Appeals 06 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Coburn, for the State.

Slip Opinion

William B. Gibson, for defendant-appellant.

WYNN, Judge.

Identification evidence is "excluded as violating a defendant's rights to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification."¹ Here, Defendant Glenn Howard Smith, Jr. argues the trial court erred by denying his motion to suppress identification evidence that was impermissibly suggestive. Because the record does not

¹ *State v. Hammond*, 307 N.C. 662, 667-68, 300 S.E.2d 361, 364 (1983).

indicate a substantial likelihood of misidentification in the show-up identification of Defendant, we find no error.

At trial, the State's evidence tended to show that on 29 November 2005, at approximately 8:20 P.M., Kimberly Middleton was working at the register of a Walgreens store in Smithfield when Defendant entered the store. Defendant, whom Ms. Middleton had seen previously come into the store, asked her to check the prices of various cartons of cigarettes. After Ms. Middleton told Defendant the price of a carton of Newport cigarettes, Defendant told her that he wanted to purchase them. Ms. Middleton then asked Defendant for identification pursuant to the store policy. Defendant responded that "your short manager knows me[.]" Ms. Middleton informed Defendant that the particular manager was not present and she would still need to see identification. Defendant then snatched the carton from Ms. Middleton's hand and walked towards the door. Before walking out the door, he turned, took his hat off, told Ms. Middleton not to call the police and left. Another customer in the store called 911.

Officer Kevin Pruden of the Smithfield Police Department responded to the call and interviewed Ms. Middleton at the store. Ms. Middleton described Defendant as a black male, approximately six feet tall, wearing a dark sweatshirt, blue jeans, and missing several front teeth. As Officer Pruden began typing the incident report in his patrol car, he received a call for assistance regarding an unrelated offense. When he arrived at the scene, Officer Pruden saw two other officers walking a black male matching

Defendant's description to the front of a police vehicle. Officer Pruden conferred with one of the officers about the Walgreens incident and Defendant was transported back to the store. An officer stayed outside with Defendant while Officer Pruden went back into the store and asked Ms. Middleton to step outside to identify Defendant. Ms. Middleton observed Defendant and asked him to take off his hat and open his mouth. Since Defendant was handcuffed, Officer Pruden removed Defendant's hat and Defendant opened his mouth to reveal missing teeth. Ms. Middleton told Officer Pruden she was "a hundred percent" certain that Defendant was the man who stole the cigarettes from her. Ms. Middleton also identified Defendant in court as being the man who stole the cigarettes.

Defendant was charged in a true bill of indictment with larceny from the person. By a separate bill of indictment, Defendant was also charged with having attained the status of an habitual felon. A jury found him guilty of larceny from the person and Defendant pled guilty to attaining habitual felon status. The trial court sentenced Defendant to 117 months' to 150 months' imprisonment.

On appeal, Defendant argues: (I) the trial court lacked jurisdiction to enter judgment against him because the larceny indictment was fatally defective and (II) the trial court erred by denying his motion to suppress identification evidence that was impermissibly suggestive.

Defendant first contends the trial court lacked jurisdiction to enter judgment against him because the larceny indictment was fatally defective. Specifically, Defendant argues the indictment was required to indicate that Walgreens, as a legal entity, was capable of owning property and that Ms. Middleton was someone in lawful possession of the property owned by Walgreens. We disagree.

A bill of indictment must contain a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision to apprise the defendant of the conduct which is the subject of the accusation. N.C. Gen. Stat. § 15A-924(a) (5) (2007). The elements of larceny are: "(1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002). Larceny from the person further requires that the property be stolen from the person or from an area within the person's protection and presence. *Id.* at 691, 573 S.E.2d at 196. An indictment for larceny must allege the "owner thereof or *the person in possession thereof* at the time of the alleged unlawful taking." *State v. McKoy*, 265 N.C. 380, 381, 144 S.E.2d 46, 47 (1965) (emphasis added).

Here, the indictment states in pertinent part:

Defendant . . . unlawfully, willfully, feloniously, and intentionally did steal, take, and carry away personal property belonging to another without the consent of

the possessor and with the intent to deprive the possessor of it permanently, knowing that he was not entitled to the property. The larceny was from the person. . . . The property belonged to Walgreen's, located at 424 North Brightleaf Boulevard, Smithfield, Johnston County, North Carolina. . . . At the time the Defendant took the property, he took it from the person of Kimberly Faye Middleton.

Contrary to Defendant's assertion, the indictment need not allege that Walgreens was an entity capable of owning property nor that Ms. Middleton was in lawful possession of the cigarettes. Rather, as noted above, the larceny from the person indictment was required to state the person "in possession thereof at the time of the alleged unlawful taking." *Id.* In this case, the indictment meets this requirement by naming Ms. Middleton as the specific person from whom Defendant took the property. Additionally, the allegations in the indictment set forth the essential elements of larceny from the person and the indictment meets the requirements of a criminal pleading pursuant to N.C. Gen. Stat. § 15A-924(a). Thus, this assignment of error is overruled.

II.

Defendant also contends the trial court erred by denying his motion to suppress Ms. Middleton's identification testimony, arguing that the "show-up" conducted outside the store was impermissibly suggestive, thus depriving him of due process of law. We disagree.

Identification evidence is "excluded as violating a defendant's rights 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. Hammond*, 307 N.C. 662, 667-68, 300 S.E.2d 361, 364 (1983). Although show-ups have been criticized as inherently suggestive and unnecessary, they are not *per se* violative of a defendant's due process rights. *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982).

In evaluating the propriety of a show-up identification under the Due Process Clause, this Court must determine if the totality of the surrounding circumstances created a "substantial likelihood of irreparable misidentification" by the witness. *Id.* "An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability." *Id.* The reliability of a show-up identification is determined by examining the following five factors:

- (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. Powell, 321 N.C. 364, 369, 364 S.E.2d 332, 335, *cert. denied*, 488 U.S. 830, 102 L. Ed. 2d 60 (1988).

An examination of the circumstances of Ms. Middleton's identification of Defendant indicates no significant likelihood of misidentification under *Powell*. First, Ms. Middleton interacted with Defendant from a distance of three feet for about five minutes

in a well-lit store. See *State v. Lawson*, 159 N.C. App. 534, 538, 583 S.E.2d 354, 357-58 (2003) (upholding identification where store clerk observed the defendant's face while being held at gunpoint for approximately twenty-five seconds). Second, there was only one other person in the store at the time, so Ms. Middleton was able to pay particular attention to Defendant. Defendant also stopped before he left the store and directly addressed Ms. Middleton. Third, Officer Pruden noticed during an unrelated incident that Defendant accurately matched Ms. Middleton's description. See *State v. Richardson*, 328 N.C. 505, 512, 402 S.E.2d 401, 405 (1991) (admitting identification when witness description included clothing and approximate height and weight of assailant). Fourth, after observing Defendant, Ms. Middleton told Officer Pruden she was "a hundred percent sure" that Defendant was the person who stole the cigarettes. Finally, the confrontation took place within an hour of the crime. See *State v. Mobley*, 86 N.C. App. 528, 531-32, 358 S.E.2d 689, 691 (1987) (upholding identification where witness viewed the defendant for five to eight seconds during car jacking and police took the defendant to the witness about an hour after the incident).

In sum, we hold that the totality of the circumstances indicate that Ms. Middleton's identification possessed sufficient reliability so that there is not a substantial likelihood of misidentification. Thus, the trial court properly denied Defendant's motion to suppress.

No error.

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Judges ELMORE and GEER concur.

Report per Rule 30(e).