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NO. COA08-328

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v.

DARIUS JERMAINE JUSTICE,
Defendant.

Wake County
Nos. 06 CRS 46671
06 CRS 46672
06 CRS 48045

Appeal by defendant from judgments entered 17 April 2007 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 12 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbrell, for the State
Michael J. Reece for defendant-appellant.

GEER, Judge.

Defendant Darius Jermaine Justice appeals from his convictions of robbery with a dangerous weapon, possession of a firearm by a felon, and having attained habitual felon status. On appeal, defendant argues that he received ineffective assistance of trial counsel. Defendant has not, however, established that in the absence of counsel's alleged errors, there is a reasonable probability that the jury would have reached a different verdict.

Facts

The State's evidence at trial tended to show the following facts. Rogelio Ayala was bicycling home from work at about 10:30

p.m. on 26 May 2006, when a man wearing blue jeans and a gray, hooded sweatshirt jumped out from behind a tree and pointed a gun at him. The man partially concealed the gun in the sweatshirt and told Ayala to give him his cell phone, billfold, and anything else he had in his pockets. Ayala gave defendant his wallet and keys.

After the man told him to run, Ayala walked his bicycle back to the area where he worked, but he soon saw the robber in that area. As Ayala approached, the man turned away and got into a white car. When Ayala passed the white car, the man ducked down. Ayala went home and called the police, then returned to the area a short time later. When Officers A.P. Kerensky and L.A. Hartman arrived, they saw defendant leaning into the white car and talking to a woman Sergeant R.E. Hoffman identified as Francesca Garris. The officers also saw a group of Hispanic men, including Ayala, standing a short distance away. Ayala pointed at defendant.

After Ayala pointed at defendant, Officer Kerensky approached the white car. Defendant immediately put his hands in the air and spontaneously said, "I didn't rob anybody." When Officer Hartman asked Garris if there were any weapons in the white car, defendant volunteered that there was a gun in the trunk. The officers searched the white car and in the trunk found a handgun wrapped in a gray, hooded sweatshirt.

In addition to the white car, the officers also searched Garris' car, which was parked nearby. Samuel Whitley was laying down in the backseat of Garris' car. Whitley testified at trial that he and defendant were driving home in the white car earlier in

the evening when they had car trouble and called Garris for help. Whitley testified that defendant had a gun with him that evening and that Whitley put the gun in the trunk of the white car because defendant was under the influence.

Defendant was indicted for robbery with a dangerous weapon, possession of a firearm by a felon, and having attained the status of habitual felon. Defendant stipulated that he was a convicted felon for purposes of the possession of a firearm charge.

At trial, defendant's former girlfriend, Vanessa Poole Garris, testified on behalf of defendant. Garris testified that on 26 May 2006, defendant called her because Whitley's car had broken down, and defendant needed a ride and help starting the car. When she got to Hillsborough Street, Whitley climbed into her car and wanted to go home, but defendant wanted to try to start the car. Garris was trying to start the White Nissan when the police arrived. Garris claimed the police said that the car had been involved in a robbery, and defendant said he did not know anything about a robbery. Garris acknowledged that she owned the gun found in the trunk of the white Nissan. The gun was normally kept in the closet at her house, and she did not know how the gun ended up in the trunk of Whitley's car.

The jury found defendant guilty of robbery with a dangerous weapon, possession of a firearm by a felon, and being a habitual felon. The trial court sentenced defendant to two consecutive presumptive-range sentences of 93 to 121 months imprisonment. Defendant timely appealed to this Court.

Discussion

At trial, Ayala did not identify defendant. During the State's direct examination of Ayala, however, the prosecutor asked Ayala, without any objection by defense counsel: "Do you remember if the defendant said anything to you that night?" Ayala testified that defendant told him to give up his money and billfold.

Later, defendant objected to Officer Kerensky's testimony that Officer Hartman told him that Ayala had identified defendant. The court allowed the testimony "simply for the purposes of describing what the officer did next, and the jury is to consider it solely for that purpose." Without objection, Officer Hartman also testified that Ayala pointed to defendant. Sergeant Hoffman, who also responded to the scene, testified:

As I recall, he was being searched, and his hands were on the hood of my car. Because I couldn't be certain - I had not yet spoken to the victim - who was to be detained, I detained the other remaining people coming that were near the business, and then several other officers came, and I was able to talk to the victim.

. . . .

. . . . There was another black male with a white shirt on at the business, and not having had an opportunity to speak to him, I wanted to make sure that in fact the defendant was the person we should be detaining.

I asked him immediately to tell me who he was talking about that had robbed him, and he told me that the person that Officer Kerensky had in his custody was the person that had robbed him.

Defendant's counsel made a motion to dismiss the charges at the end of the State's evidence based on Ayala's failure to identify defendant. Counsel did not, however, renew the motion after the close of all the evidence.

Defendant's sole argument on appeal is that trial counsel rendered ineffective assistance because he: (1) failed to object to the officers' testimony as hearsay when the officers recounted how Ayala gestured at and identified defendant; (2) failed to object to the prosecutor's reference to the robber as "defendant" when Ayala had not identified defendant at trial; and (3) failed to renew his motion to dismiss at the close of all the evidence. In order to successfully prove a claim of ineffective assistance of counsel, a defendant must establish not only that his counsel's performance was deficient, but also that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). Our Supreme Court has held that "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

According to defendant, if defense counsel had objected to the hearsay evidence regarding Ayala's identification at the scene and the prosecutor's reference to the robber as "defendant," those

objections would have been sustained, with the result that the trial court would have been required to grant a motion to dismiss at the close of the evidence. Even if, however, all references to Ayala's out-of-court identification had been excluded, there would still have been sufficient evidence for the charges to go to the jury.

A motion to dismiss requires the trial court to examine the evidence and determine whether there is substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Furthermore:

It is elementary that, upon a motion for judgment of nonsuit in a criminal action, all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom.

State v. Witherspoon, 293 N.C. 321, 326, 237 S.E.2d 822, 826 (1977).

At trial, the State presented evidence that when Officers Kerensky and Hartman approached the white Nissan, in which Ayala had seen the perpetrator hiding, defendant volunteered, "I didn't rob anybody," even before anyone mentioned a robbery. In response to the officers' question regarding whether there were any weapons in the car, defendant told them that there was a gun in the trunk. That gun was wrapped in a gray, hooded sweatshirt, matching the description of the sweatshirt worn by the robber. According to

Whitley, defendant had brought the gun with him. Defendant's girlfriend confirmed that she owned the gun, that she kept it in her closet, and that she did not know how it ended up in the trunk. This evidence placing defendant at the car identified with the perpetrator, establishing defendant's knowledge of the robbery and location of the gun used in the robbery, and putting the gun in defendant's possession was sufficient to warrant denial of the motion to dismiss.

With respect to the failure to object, we first note that defendant has not challenged on appeal the trial court's ruling permitting the following testimony by Officer Kerensky: "Officer Hartman told me that the victim was pointing towards Mr. Justice's location. I walked over to Mr. Justice. I asked him to show me his hands. Immediately after I asked that question, he made a spontaneous utterance to me. He said, I didn't rob anybody, put his hands up." The trial court admitted this testimony for the limited purpose of explaining the officer's subsequent actions. In addition, defendant has not challenged on appeal other testimony of Officer Kerensky about the out-of-court identification: "When we got up there, the victim was pointing over to the vehicle and actually had pointed to Mr. Justice, and that's kind of when I stood there waiting to see what Officer Hartman was going to advise me." Defendant has not explained how, in light of this unchallenged testimony, the remaining evidence of the out-of-court identification would have had a probable effect on the jury's verdict.

Finally, defendant argues that his trial counsel should have objected when the prosecutor asked Ayala: "Do you remember if the defendant said anything to you on that night?" Defendant does not point to any Rule of Evidence that would support an objection to this question, but rather argues that it was improper because Ayala had not identified defendant as the robber. We nonetheless do not believe that the prosecutor's single reference to "defendant" when asking Ayala about what happened was sufficiently prejudicial given defense counsel's ability to establish on cross-examination that Ayala was not able to identify defendant as the perpetrator of the robbery.

In sum, even assuming, without deciding, that defense counsel's performance was deficient, defendant has not sufficiently established that he was prejudiced by the alleged deficiency. Therefore, we hold defendant received a trial free of prejudicial error.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).