NO. COA09-1256

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 07 CRS 252803

MICHAEL DWAYNE McGRIFF
Defendant.

Appeal by Defendant from judgment entered 11 March 2009 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Kris A. Wampler, for Defendant.

McGEE, Judge.

Edmundo Hernandez (Hernandez) and Enrique Garcia (Garcia) were sitting on a sidewalk curb of a parking lot in Charlotte on 8 November 2007 discussing blueprints related to a construction job in which they were involved. A man in a red Toyota Tacoma pickup truck (the truck) drove past Hernandez and Garcia twice before stopping the truck and approaching the two men. Hernandez testified at trial that when the man walked over to them, the man "took out his gun. He told us, 'Don't run, motherf*****s.'" Hernandez testified that he and Garcia remained seated, and the man

> came and faced us. He walked behind us. He put the gun to our head. He took the money that belonged to [Garcia]. He took [Garcia's] wallet and my wallet as well. [Garcia] tried to give him, like a portion of the money, and he said, "[d]on't play with me, motherf*****s." He took everything away from [Garcia]. First he did that to [Garcia], then he did the same to me. Then he got in his truck and left.

Hernandez described the gun as a black pistol with a black grip. Hernandez testified that, as the man was walking away, the man was looking at Hernandez and Garcia. Hernandez and Garcia attempted to follow the man in Garcia's truck, but lost him. Hernandez called 911 and gave police a description of the man, the truck, and the truck's license tag number. Officers, including Officer Kevin Allred of the Charlotte-Mecklenburg Police Department, responded to the scene and interviewed Hernandez and Garcia. Officer Allred testified that he interviewed Hernandez, who again gave a description of the man and the truck. Hernandez told Officer Allred that he believed the truck's license tag number was WDP 3645. Officer Allred ran the tag number, but that number did not exist. Officer Allred testified that he was familiar with common letter combinations associated with license tags, and WDP was not one he recognized. However, he testified that WPD was commonly used by the North Carolina Department of Motor Vehicles. Officer Allred then ran the number WPD 3645, and it returned as registered to a Toyota Tacoma truck. Officer Allred initiated an alert for a red Toyota Tacoma with the license tag WPD 3645. Approximately two hours later, police located a Toyota Tacoma matching the description given by Hernandez, bearing the license

tag WPD 3645. Michael Dwayne McGriff (Defendant) was driving the truck.

Charlotte-Mecklenburg Police Detective Ivan Reitz was informed that Defendant was a suspect in an armed robbery. Detective Reitz assembled a photographic lineup containing six photographs of different men, one of which was of Defendant, and five of which were photographs of men of similar appearance to Defendant, but who were not suspected of involvement in the crime. Detective Reitz gave Officer Brian Whitworth a folder containing the photographs. Officer Whitworth knew nothing about the crime or Defendant, and did not know which of the six photographs was Defendant's photograph. Detective Reitz testified: "At the time we were participating in a study, which now is state law. It has to be double-blind. Whoever the administrator of the lineup is, they can't know who the subject is."

Officer Whitworth testified that, before presenting Hernandez with the photographic lineup, he instructed Hernandez that the person who committed the crime might or might not be included in the photographic lineup; that Hernandez was not obligated to identify anyone from the lineup; that Hernandez could take all the time he needed; and that even if Hernandez did identify someone before Hernandez had viewed all of the photographs, Hernandez was to continue and view all the photographs before making any final determination. Officer Whitworth then showed Hernandez the first photograph, and asked Hernandez if he recognized the man in the photograph. Hernandez replied that he did not, and Officer

Whitworth turned over that photograph. Officer Whitworth repeated this procedure with the second photograph, with the same result. Officer Whitworth presented the third photograph to Hernandez, which was of Defendant, and Hernandez informed Officer Whitworth that he recognized the man. Hernandez stated that it was "the same face as the person who robbed [me]." Officer Whitworth continued with the remainder of the photographs in progression, and Hernandez stated that none of the other photographs matched the man who had robbed him at gunpoint.

Defendant was indicted on two counts of robbery with a deadly weapon, one for the robbery of Hernandez and one for the robbery of Garcia. The jury returned a verdict of guilty on one charge of robbery with a deadly weapon, and a verdict of not guilty on the second charge of robbery with a deadly weapon, on 11 March 2009. Defendant appeals.

I.

In Defendant's first argument, he contends the trial court committed plain error in allowing testimony concerning the photographic lineup. We disagree.

In order for Defendant to meet his burden on this issue, he must show "that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citations omitted).

As Defendant states in his brief:

> Evidence must be excluded as a violation of a defendant's due process rights "where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification." *State v. Powell*, 321 N.C. 364, 368, 364 S.E.2d 332, 335 . . . (1988). This due process analysis consists of a two-part inquiry: the reviewing court must first determine whether the identification procedures at issue were impermissibly suggestive. *State v Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 . . . (2001). If the first part of the test is satisfied, the reviewing court will then consider whether the procedures created a substantial likelihood of irreparable misidentification. *Id.*

This is not the standard of review, however, when our Court conducts plain error analysis. Even under the standard applicable to regular appellate review, Defendant's argument must fail. There is nothing in the record to suggest the "identification procedures at issue were impermissibly suggestive." A double-blind procedure was used by the police officers in this case. Officer Whitworth did not know which photograph in the lineup was of Defendant. Officer Whitworth had no opportunity to suggest to Hernandez that the third photograph was of Defendant (the suspect at that time). After Hernandez identified the third photograph as the man who robbed him and Garcia, Officer Whitworth continued until Hernandez had viewed all six of the photographs in the lineup.

Failing to meet his burden of showing that the identification procedure was impermissibly suggestive, Defendant also fails to show that there existed "a very substantial likelihood of irreparable misidentification." *Powell*, 321 N.C. at 368, 364

S.E.2d at 335. Defendant has not met his burden of proving error, much less plain error, and his argument is without merit.

II.

In Defendant's second argument, he contends the trial court erred by denying Defendant's motion to dismiss and by entering judgment when the evidence was inconsistent with the jury's verdict and insufficient to support the jury's verdict. We disagree.

> "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.' If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then '"it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty."'"
>
> "Both competent and incompetent evidence must be considered." In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict "may be used to explain or clarify the evidence offered by the State." When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455-56 (2000) (internal citations omitted).

Defendant first argues that his motion to dismiss should have been granted because Hernandez's identification of Defendant as the perpetrator of the crimes was inadmissible, due to an improper photographic lineup; therefore, the evidence at trial was insufficient to prove that Defendant was the perpetrator of the crime. Because we have found no error in Hernandez's identification of Defendant as the perpetrator of the crimes through the photographic lineup, we hold this argument fails.

III.

Defendant next argues that, because Garcia did not testify at trial, there was insufficient evidence to support Defendant's guilty verdict for the charge of the robbery of Garcia with a dangerous weapon. Hernandez's testimony constituted substantial evidence that Defendant approached Hernandez and Garcia with a gun and placed the gun next to both the head of Hernandez and the head of Garcia. Hernandez testified that:

> [Defendant] took the money that belonged to [Garcia]. [Defendant] took [Garcia's] wallet and my wallet as well. [Garcia] tried to give [Defendant], like a portion of the money, and [Defendant] said, "[d]on't play with me, motherf*****s." [Defendant] took everything away from [Garcia]. First [Defendant] did that to [Garcia], then [Defendant] did the same to me.

We hold this testimony provided substantial evidence that Defendant robbed Garcia.

Defendant finally argues that no evidence was presented to

show that the gun used in the robbery was "operable, viable or created any type of danger to Mr. Garcia." However,

> [w]hen a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be -- a firearm or other dangerous weapon.

State v. Thompson, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). Defendant's argument is without merit.

IV.

In Defendant's third argument, he contends that the trial court committed plain error in failing to instruct the jury upon the lesser included offense of common law robbery. We disagree.

The undisputed evidence shows that a man, holding what appeared to be a gun, approached Hernandez and Garcia, placed the gun near both their heads and demanded money, obtained money, and left with the money. We have already held that there was sufficient evidence presented at trial that Defendant was the perpetrator of this crime. We hold that the trial court did not err in refusing to give a common law robbery instruction because of the presumption stated in *Thompson*, *supra*, that what appears to be a deadly weapon when used to facilitate a robbery, is in fact a deadly weapon. "'The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.'" *State v. Cummings*, 346 N.C. 291, 325, 488 S.E.2d 550, 570 (1997)

(internal citations omitted).

Defendant claims no direct knowledge concerning the gun used in the robbery, as Defendant testified at trial that he did not participate in the robbery, and knew nothing about it. The only evidence in the record concerning the nature of the gun consisted of Defendant's attorney questioning Hernandez about the weapon. Hernandez testified that the weapon looked like a real gun, and that he believed it to be a real, functioning gun. This is sufficient evidence to support Defendant's conviction for robbery with a dangerous weapon. Even assuming, *arguendo*, that the trial court should have instructed the jury on the lesser included offense of common law robbery, we hold Defendant has failed in his burden of proving "that a different result probably would have been reached but for the error or . . . that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779. Defendant's prejudice argument related to this issue is limited to a statement in his brief that, because Defendant denied having committed the robbery and because the State failed to provide evidence of the operability of Defendant's gun, the plain error standard has been met. Defendant's denial of guilt plays no part in the analysis, and the *Thompson* presumption relieves the State of any duty to prove the gun was operable. This argument is without merit.

No error.

Judges GEER and ERVIN concur.

Report per Rule 30(e).